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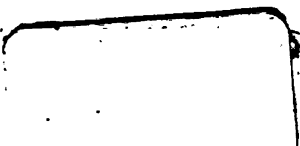
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REPORTS

OF

CASES ADJUDGED AND DETERMINED

IN THE

COURT OF CHANCERY

OF THE

STATE OF DELAWARE,

BY

WILLARD SAULSBURY,

LATE CHANCELLOR (DEC'D).

PUBLISHED UNDER AUTHORITY OF THE GENERAL ASSEMBLY, BY

WILLARD SAULSBURY, JR.,

OF THE NEW CASTLE COUNTY BAR.

VOL. VI.

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PREFACE.

UNDER the authority of the joint resolution of the General Assembly of the State of Delaware, adopted February 10th, 1893, being Chapter 809, Vol. 19, Laws of Delaware, the present reporter was authorized to prepare for publication and publish cases in equity determined by Willard Saulsbury, late Chancellor. The cases reported in this volume were, almost without exception, completed and in manuscript ready for publication at the death of the late Chancellor and the reporter has not taken the liberty to change such reports in any respect.

A few cases which were found in an incomplete form have been so far as possible completed and are published herewith.

Appendix "A" is added on account of the value it may be to the members of the legal profession as an authority on the jurisdiction and powers of the Orphans' Court. The opinion having been delivered by the Chancellor as President of the Court in that case and there being no reports of the Orphans' Court, after consultation with many of the Members of the Bar of the State, it has been deemed advisable to include it in this report, especially as the number of cases reported admits of its publication within the size of a reasonable volume.

Appendix "B" contains the opinion of Edward Ridgely, Chancellor ad litem in the case of *Burton v. Willin*. The reporter feeling that the learning and legal ability of the Chancellor ad litem in that case would warrant its publication in our Chancery Reports.

Appendix "C" contains a brief sketch of the late Chancellor Saulsbury, taken with some abbreviations and only slight changes from a legal periodical published soon after his death, and also the resolutions of the Bar in the several Counties. It is added in accordance with the custom which has come to prevail of publishing an appendix of this character with the reports of a deceased Chancellor.

WILLARD SAULSBURY, JR.

JUNE, 1895.



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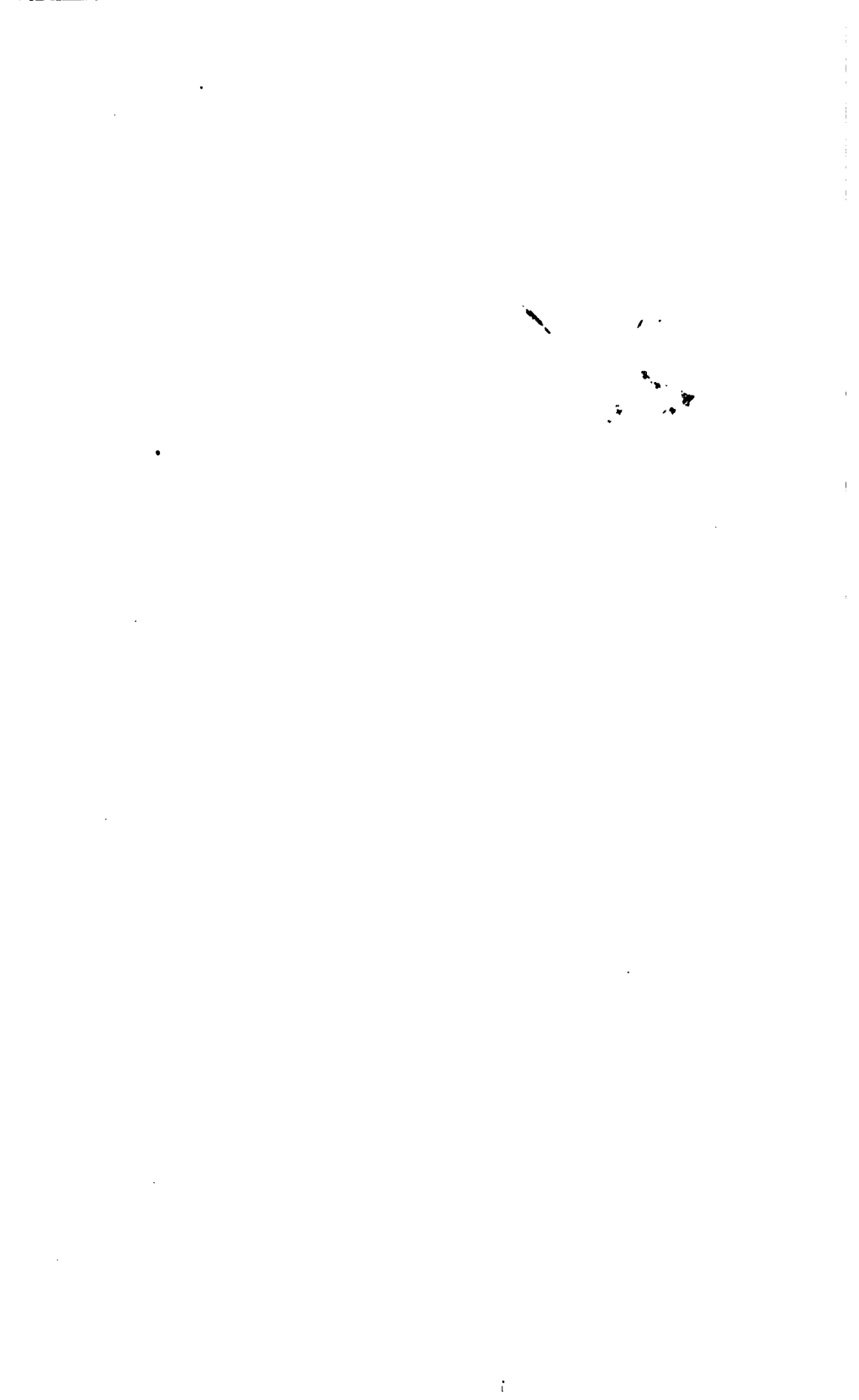
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CASES IN CHANCERY.

DELAWARE.

J. ALEXANDER FULTON

vs.

THE TOWN OF DOVER *et al.*

Kent, March T. 1886.

*Dedication of land for streets ; condemnation of land
for streets in Dover ; procedure.*

1. Where the proprietor of land lays out the same into building lots, with streets and alleys between them, and makes and records a plot thereof, he thereby dedicates such streets and alleys to public use; and both the lot holders and the citizens generally are entitled to use the same.
2. And where such lots are afterwards included in an old and adjoining town by extending the corporate limits thereof, no proceedings by the corporate authority for the condemnation of any of said streets are necessary; they are already public streets by the prior dedication.
3. An Act of Assembly required that upon the condemnation of any real estate for the purpose of a street, immediate notice thereof should be given the owner of the land so to be taken. In pursuance of this legislative authority, the town council of the town of Dover passed a resolution of condemnation, December 7, 1885, but the owner was not notified until March 26, 1886. *Held:*

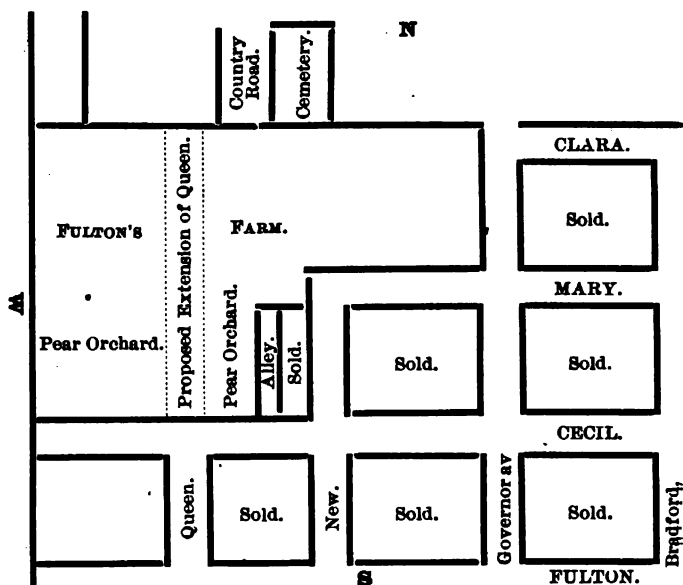
 Syallabus.—Statement.

- (a) That the notice came too late.
 (b) That the resolution of condemnation was ineffectual in consequence thereof.
 (c) That the town council should be enjoined from executing it.
4. Statutes appropriating private property to public use must be strictly pursued.

BILL FOR AN INJUNCTION.—The bill seeks to restrain the Town of Dover from further action in its proceeding to take land belonging to complainant for the purpose of extending Queen street from Cecil street to Clara street.

The facts are sufficiently stated in the opinion.

The following is a portion of the map referred to in the opinion, showing the location of the land in question :



J. Alexander Fulton, complainant, pro se :

The assessment of damages is a judicial act, involving

Argument for complainant.

consideration, discrimination, and judgment; and, even had the town council been a competent tribunal to pass upon the question, it was necessary that all the members should be present and act, and the attempt of a less number to assess them was void. 13 Encyclopedia Britannica, 762; Act Feb. 27, 1879, §§ 7, 8, 16; *Crocker v. Crane*, 21 Wend. 211; *Rice v. Danville etc. Turnpike Road Co.* 7 Dana, 81; 1 Jac. Law Dict. 194.

The land cannot be taken without compensation. This must be ascertained in a lawful way. There must be a hearing, or opportunity to be heard, before a fair and impartial tribunal. If the Act of February 27, 1879, attempts to authorize a seizure without securing this, it is void. Eng. Stat. 5 Edw. III., chap. 9; 25 Edw. III., chap. 4; 28 Edw. III., chap. 3, as cited in 4 Jac. Law Dict. 154, 208, 209; 1 Bl. Com. 139; U. S. Const. arts. 5, 14; Del. Const. Preamble, art. 1, § 8, conclusion art. 1; *Stuart v. Palmer*, 74 N. Y. 183; *Adams v. Saratoga & W. R. Co.* 10 N. Y. 333; *Curran v. Shattuck*, 24 Cal. 432; *Jordan v. Hyatt*, 3 Barb. 275; *People v. Tallman*, 36 Barb. 222; *Mulligan v. Smith*, 59 Cal. 206; *Com. v. Coombs*, 4 Mass. 489; *Powers v. Bears*, 12 Wis. 214; *Kramer v. Cleveland & P. R. Co.* 5 Ohio St. 140; *Vail v. Morris & E. R. Co.* 1 Zab. 189.

The petition of citizens for the opening of Queen street presented to council, December 15, 1884, the resolutions of council adopted December 7, 1885, and the notice to complainant dated March 25, 1886, and served on the next day, cannot be connected and treated as one continuous proceeding; but the long delay to proceed under the petition, and also, under the resolutions, was an abandonment thereof. Act February 27, 1879, §§ 7, 8; *Bensley v. Mountain Lake Water Co.* 13 Cal. 306.

The compensation must be adequate and in money. Speculative compensation, as the supposed enhanced

Argument for complainant.

value of the adjacent land, is not the compensation meant by the Constitution. *Eward v. Lawrenceburgh & Up. M. R. Co.* 7 Ind. 711; *Bigelow v. W. Wisconsin R. Co.* 27 Wis. 478; *Carson v. Coleman*, 3 Stockt. 106; *Rice v. Danville etc. Turnpike Road Co.* 7 Dana, 81; *Louisville & N. R. Co. v. Glazebrook*, 1 Bush, 325; *Sater v. Burlington*, 1 Iowa, 386; *Carpenter v. Landaff*, 42 N. H. 218; *Roberts v. Brown Co. Comrs.* 21 Kan. 247; *Winona etc. R. Co. v. Denman*, 10 Minn. 267; *Sacramento Valley R. Co. v. Moffatt*, 6 Cal. 74.

There must be a survey, and the proceedings were void for want of it. *O'Hara v. Pennsylvania R. Co.* 25 Pa. 445; *Rice v. Danville etc. Turnpike Road Co.* 7 Dana, 81, 86; *Vail v. Morris & E. R. Co.* 1 Zab. 190.

No legal right was waived by giving notice of dissatisfaction at assessment of damages and notice of appeal. *Cincinnati v. Coombs*, 16 Ohio, 181; *Unangst's App.* 55 Pa. 128; *O'Hara v. Pennsylvania R. Co. supra.*

Every Act of Assembly in derogation of the common law; and every Act establishing a special tribunal or conferring special power must be strictly construed. *Watson v. Acquackanonck Water Co.* 7 Vroom, 195; *Harbeck v. Toledo*, 11 Ohio St. 219; *Mitchell v. Kirtland*, 7 Conn. 229; *Shaffner v. St. Louis*, 31 Mo. 264; *Leslie v. St. Louis*, 47 Mo. 474; *Gilmer v. Lime Point*, 19 Cal. 47; *Stanford v. Worn*, 27 Cal. 171; *Curran v. Shattuck*, 24 Cal. 427; *Adams v. Saratoga & W. R. Co.* 10 N. Y. 328; *Halstead v. New York*, 3 N. Y. 430.

An injunction is the proper remedy. *Leslie v. St. Louis*, 47 Mo. 474; *Moorhead v. Little Miami R. Co.* 17 Ohio, 340; *Unangst's App.* 55 Pa. 128; *Harness v. Chesapeake etc. R. Co.* 1 Md. Ch. 248; *Powers v. Bears*, 12 Wis. 214; *Curran v. Shattuck*, 24 Cal. 427.

There was no dedication of any part of Queen street north of Cecil. There was no intention to dedicate it.

 Argument.

It never was opened or used by any one but the complainant, and up to the present time remains, as it was in 1877, a part of his pear orchard. At the time of the pretended dedication it was outside the town limits. It never was accepted as a highway. The town by its own proceedings, such as they were, acknowledged that it was private property, and never pretended otherwise until this injunction was granted. *Williams v. New York & N. H. R.* 39 Conn. 509; *Hall v. Meriden*, 48 Conn. 416; *Hayden v. Stone*, 112 Mass. 346; *Steele v. Sullivan*, 70 Ala. 589; *Hawley v. Baltimore*, 33 Md. 270; *Hall v. Baltimore*, 56 Md. 187; *Peoria v. Johnston*, 56 Ill. 45; *Harding v. Hale*, 61 Ill. 192; *Forbes v. Balenseifer*, 74 Ill. 183; *Booraem v. North Hudson County R. Co.* 12 Stew. Eq. 465; *White v. Bradley*, 66 Me. 254; *Ramthun v. Halfman*, 58 Tex. 551; *Ogle v. Philadelphia etc. R. Co.* 3 Houst. 267; *State v. Atherton*, 16 N. H. 203; *Bissell v. New York Cent. R. Co.* 26 Barb. 630; *Witter v. Harvey*, 1 McCord, *67; *State v. Nudd*, 23 N. H. 327; *Remington v. Millerd*, 1 R. I. 93; *Cemetery Asso. v. Meninger*, 14 Kan. 312.

James Pennewill and *C. H. B. Day*, for the defendants:

The power and authority of the town council to locate, lay out, and open streets, is given by 16 Del. Laws, chap. 107, §§ 7, 8.

All the proceedings of the town council in respect to the opening of Queen street through the land of complainant were in conformity with the requirements of sections 7, 8, of said chapter 107, vol. 16, Laws of Delaware, and the notice prescribed by said section 8, to be given in writing to the owner or owners of the real estate through or over which the street might pass was given to said complainant in due time. *Re Opening Furman*

Argument for defendants.

Street, 17 Wend. 649; *Re Pittsburgh*, 2 Watts & S. 320; *Easton v. Walter* (Pa.) 2 Cent. Rep. 589; *Grace v. Newton Health Board*, 135 Mass. 490; *Baltimore v. Bouldin*, 23 Md. 370.

The State, having the right of eminent domain in all the lands of its citizens, may assert this paramount title, and divest private property for public use, making just compensation therefor. The State may exercise this right through private corporations or individuals as well as by its more direct agents. The Legislature is to judge of the propriety and necessity of divesting private property for public purposes; and it may provide the mode of assessing the compensation. In assessing compensation the advantage or injury resulting to the owner of the lands from the laying out of the street may be considered. The intrinsic value of the land taken is not the true rule of damages. 2 Dill. Mun. Corp. §§ 602, 615, 616; *Dunlap v. Mount Sterling*, 14 Ill. 251; *Curry v. Mount Sterling*, 15 Ill. 320; *Dorgan v. Boston*, 12 Allen, 223; *Baltimore v. Bouldin*, 23 Md. 328; *People v. Smith*, 21 N. Y. 598; *People v. Brooklyn*, 4 N. Y. 419; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45; *Alexander v. Baltimore*, 5 Gill, 383; *Livingston v. New York*, 8 Wend. 101; *Indianapolis Water Works Co. v. Burkhardt*, 41 Ind. 364; *Whiteman v. Wilmington & S. R. Co.* 2 Harrington, 514.

The authority conferred upon the town council to lay out streets, and the proceedings had under the act of the Legislature, is "due process of law." The legislative Act is itself due process of law. *People v. Smith*, 21 N. Y. 595; *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 372; *Columbia Bank v. Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Baltimore v. Bouldin* and *People v. Brooklyn*, *supra*; *Stuart v.*

Argument for defendants.

Palmer, 74 N. Y. 190; *Owners of Ground v. Albany*, 15 Wend. 374; *Livingston v. New York*, 8 Wend. 100.

A majority of the town council is all that is required to constitute a quorum for the transaction of any business. Del. Laws, vol. 16, chap. 107, § 16; *Cupp v. Seneca County*, 19 Ohio St. 173.

A court of equity will not interfere where there is an adequate remedy at law, or where the party did not seek to vindicate his rights in the proper place and in due time. *Stevens v. Beekman*, 1 Johns. Ch. 318; *Jerome v. Ross*, 7 Johns. Ch. 315; *People v. Brooklyn*, 4 N. Y. 442; *Columbia Bank v. Okely*, 17 U. S. 4 Wheat. 242, 4 L. ed. 561; *Gott v. Carr*, 6 Gill & J. 311; *Stuart v. Baltimore*, 7 Md. 514; *Methodist Prot. Church v. Baltimore*, 6 Gill, 891; *LeRoy v. New York*, 4 Johns. Ch. 352.

Where the owner of a tract of land has laid the same out in lots, and has made a map or plot thereof and recorded the same, and has also made sales of the lots to various purchasers with reference in the deeds of conveyance to such map or plot, the conveyances, taken in connection with the map or plot to which they refer, operate as a conclusive grant or covenant, securing to the purchasers and to the town all the advantages, privileges, and easements to the lots of the town; and the town has a right at any time to open the streets without condemnation proceedings. And when the town in which the tract of land so laid out is not incorporated, or when the tract of land is not in the town limits at the time it is so laid out, as soon as the town becomes incorporated, or such tract of land so laid out is included within the incorporated limits, the streets, lanes, and alleys, and public grounds become vested in the town, and are under the control, government, and management of the town authorities. *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8

Opinion.

L. ed. 452; *Barclay v. Howell*, 31 U. S. 6 Pet. 504, 8 L. ed. 479; *Baltimore v. Bouldin*, 23 Md. 372; *White v. Flannigain*, 1 Md. 525; *Livingston v. New York*, 8 Wend. 85; *Watertown v. Cowen*, 4 Paige, 510; *Rowan v. Portland*, 8 B. Mon. 232; *Hoboken M. E. Church v. Hoboken*, 4 Vroom, 13.

THE CHANCELLOR.—In 1879, J. Alexander Fulton, the complainant, being the owner of a tract of land adjoining the town of Dover and immediately north and west thereof, caused the same to be surveyed as an addition thereto. He caused the map of the same to be made and recorded in the recorder's office of Kent County, in which streets and alleys running north and south, east and west, are described and located. Of these streets, Division, Fulton, Cecil, Mary, and Clara are described as extending from State street to the Delaware Railroad and beyond, and running east and west. Bradford street, Governor avenue, New, Queen, Kirkwood and West streets are described on the map as running north and south. The streets run at right angles, and are all described as sixty feet wide.

Upon the map, recorded as aforesaid, there is indorsed a note in the following words: "All the streets are sixty feet wide. All the alleys twelve feet, except the one between State and Bradford streets, which is fifteen feet wide. The streets running east and west run at right angles with State street. New and Queen streets terminate in Mary street, on the north. Kirkwood and West in Cecil street on the north. All the streets west of the Delaware Railroad terminate in Mary street, on the north. The lines appearing on the plot north of Mary street and west of the railroad were never marked on the ground, and were merely experimental and prospective."

Opinion.

Mr. Fulton, according to this plan delineated on the map, sold lots, amounting somewhere to near 100 in number, to different persons, many of which have been built upon as places of residence or business, chiefly the former. Fulton's addition has been included within the limits of the town of Dover; the deeds from him to the purchasers of lots all have referred to the recorded plot or map.

By Act of the General Assembly entitled, "An Act to Incorporate the Town of Dover," (Act of February 27, 1879, 16 Del. Laws, p. 140), it is provided in the seventh section thereof that "the town council shall have power, upon the application of ten or more citizens of the town, by petition for the purpose, to locate, lay out, and open or widen any new street or streets, lane or lanes, or alley or alleys, or widen any street, lane, or alley, heretofore laid out or hereafter to be laid out in said town, or reopen any old street or streets, lane or lanes, or alley or alleys now closed, or which may hereafter be closed, which ten or more citizens may desire to be located, laid out, and opened, or widened, or reopened, allowing to the persons, respectively, through or over whose lands such street or streets, lane or lanes, or alley or alleys may pass, such compensation therefor as they shall deem just and reasonable under all circumstances; which compensation, if any be allowed, shall be paid by the treasurer of the town out of the moneys of said town, upon warrants drawn upon him by order of the council aforesaid."

By the eighth section of said Act it is, among other things, provided that "whenever the town council shall have determined to locate and lay out or widen any street, lane, or alley, and shall have fixed the compensation therefor, it shall be their duty, immediately after the survey and location of the said street, lane, or alley, to notify, in writing, the owner or owners of the real estate,

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through or over which such street, lane, or alley may run, of their determination to open and widen the same, and to furnish a general description of the location thereof, and also the amount of the damages or compensation allowed to each; and if such owner be not resident within the said town, to notify the holder or tenant of said real estate; but if there be no holder or tenant resident in said town, the said notice may be affixed to any part of the premises."

It seems that the petition of Thomas R. Taylor and twenty-six other citizens of the town of Dover was presented to the town council on the 15th day of December, 1884, requesting the said town council to locate, lay out, and open a new street through the land of said J. Alexander Fulton, from where Queen street now terminates in Cecil street, making the same a continuation of said Queen street to Clara street; and that said petition was received, and referred to the committee on streets.

No public action was taken in respect to the opening of Queen street until the 7th day of December, 1885, when the report of the street committee, in relation to the opening of said street, was taken up for consideration, and the following resolves were adopted:

"*Resolved*, that Queen street be opened and extended from Cecil street to Clara street, of the width of 60 feet, taking into said street 60 feet front on Cecil street (the said front being on the direct line of Queen street as now opened), and running from thence, the same width, to Clara street, to a point where the road, surveyed and laid out under chapter 544 of volume 17 of the Laws of Delaware, ends on said Clara street (the centre of said Queen street as extended being the centre of the said road at its termination on said street), of the lands of J. Alexander Fulton; and that said J. Alexander Fulton be allowed the sum of six cents as damages; and that said sum be paid to said Fulton.

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"*Resolved*, that the committee on streets be instructed to have the said street, as extended, surveyed and laid out as one of the public streets of the town; and that the same, when so laid out, is hereby declared to be a public street of the town of Dover, of the width of 60 feet."

The report of the street committee was made to the town council on the 3d day of February, 1885; and no action was taken by the council in respect to it until said 7th day of December, 1885. No notice of the condemnation proceedings by the town council was given to Fulton until the 26th day of March, 1886, when such notice was given in the following words:

DOVER, Del., March 25, 1886.

MR. J. ALEXANDER FULTON:

You are hereby notified that the town council of the town of Dover, at its regular meeting on the 7th day of December, A. D. 1885, did resolve to open Queen street from Cecil street to Clara street, of the width of 60 feet; and that they have condemned 60 feet front and 1,260 feet deep of land belonging to you; and that the said council has allowed to you, as damages, the sum of six cents.

A. S. KIRK, *Clerk of Council*.

From these proceedings of the council, Fulton appealed; but, from not having done so in time or from other cause, withdrew it, and has filed his bill in this court praying an injunction against the corporation from further action, under their proceedings, in the taking of his land and the opening of Queen street.

Upon the above state of facts, I am of the opinion, first, that there was no necessity of any condemnation proceedings, by the town council, of that portion of Queen street lying between Cecil and Mary streets. It had already been dedicated to public use by Mr. Fulton,

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by the survey and map hereinbefore referred to, and by the sale of lots to the different purchasers from him, and conveyance of said lots by him to the purchasers, in which the map, which he caused to be made and recorded with the streets thereon particularly described, is distinctly referred to.

This map, as remarked by the court in the case of *Rowan v. Portland*, 8 B. Mon. 235 (a case very similar in every respect to this), is to be assumed as the representation of the town in which the lots were sold; and not as a merely verbal, but as a written and recorded, representation of its localities and divisions, its streets and alleys, so far as they are indicated by it. In all these respects it is to be regarded as having entered into and formed a part of every contract for the sale of a lot in the town, by its number or position in the plan, and as having been adopted and confirmed by every conveyance of a lot described by similar reference. It is, in fact, identified with the town itself; and every reference to or recognition of the town is a recognition of the plan by which its various divisions, and the localities and uses of its different parts, are identified. Every purchaser of a lot, according to the plan, acquired an interest in it; not only as evidence of the position of his purchase, but as evidence also of the several advantages and privileges pertaining to the town and the lots, as indicated by the plan, and especially as evidence of the localities, divisions, and uses of its various parts as therein presented. In purchasing and paying for his lot, he purchased and paid for, as appurtenant to it, every advantage, privilege, and easement which the plan represents as belonging to it as a part, or to its owner as a citizen, of the town; and the conveyance of each lot with a reference to the map, or merely as a part of the town, was a conveyance of all these appurtenances as ascertained by the map. These

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conveyances, in connection with the map to which they refer, operate as a conclusive grant or covenant, securing to the purchasers and to the town all advantages, privileges, and easements to the lots of the said town.

The notoriety—actual as well as legal—of the acts involved in the making of Fulton's addition to Dover; the laying out of the same upon the land; the representation of it upon a map, open to public inspection, and recorded in the office of the recorder of deeds; the sale and conveyance of lots according to that plan; the record of the deed referring to the plan; the subsequent enclosure and improvement of some of them for business or residence; and the existence of the addition to the town of Dover upon the land,—must be considered as giving to the world such notice of the plan to which all these acts and facts have reference, as to preclude the possibility of afterwards acquiring from the original proprietor, or of asserting, or of claiming, with a good conscience, any right or interest inconsistent with those which, according to the plan of the addition thus made by him to the town, are appurtenant to the lots; and are therefore granted to or held for the lot owners or citizens and the local or general public.

The right acquired by a purchase of a lot in this addition to Dover is not confined to the mere use of the ground purchased, but extends to the use of all the streets, alleys, and other public rights in the town, according to their appropriate purpose.

These opinions in respect to the rights of purchasers of property on streets dedicated to public use by the owners of land over which they pass, and of the public therein, are expressed almost in the exact words of *Chief Justice Marshall*, of Kentucky, in the opinion delivered by him in the case of *Rowan v. Portland*. And they have been so expressed because it is difficult to improve upon the

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language used by him, and because they are eminently applicable to the present case.

In my opinion, the town council of Dover had the right at any time after Fulton's addition was, by law, made a part of the town of Dover, and after Mr. Fulton so as aforesaid dedicated said streets to the use of the purchasers of lots on said streets, and to the public, to do whatever was necessary and proper for rendering them fit for travel, without taking any steps whatever toward the condemnation of the land over which they passed, under the Act for the incorporation of the town of Dover; and that therefore they might then, and may now, if anything is necessary for that purpose to be done to render Queen street, from Cecil street to Mary street, available to public travel, do whatever is so necessary, without reference to said Act of incorporation.

In respect to that portion of Mr. Fulton's land over which it is proposed to extend Queen street to Clara street, opposite the new county road, mentioned in the bill, and also in the resolution adopted by the town council, the case would be different. The land, over which Queen street is thus proposed to be extended has never been dedicated by Mr. Fulton to the purchasers of lots from him or to the public. Condemnation proceedings would be necessary under the Act for extending said Queen street over the land between Mary street and Clara street.

The proceedings taken by the town council heretofore for that purpose were not, in my opinion, sufficient, and were not in accordance with the Act from which they derive their authority.

The eighth section of that Act, as we have seen, declares that whenever the town council shall have determined to locate and lay out or widen any street, lane, or alley, and shall affix the compensation therefor, it shall be its duty,

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immediately after the survey and location of the said street, lane, or alley, to notify in writing the owner or owners of the real estate through or over which such street, lane, or alley may run, of their determination to open and widen the same, and to furnish a general description of the location thereof, and also the amount of the damages or compensation allowed to each.

Now, a survey in all cases is not at all necessary, if by a survey be meant the employment of a surveyor and the actual measurement by him of the land to be condemned. It is indeed rarely that such a survey would be necessary. The persons authorized to make the condemnation may do so on their view of the premises. Generally in towns a very small distance and a very small space of land belonging to an individual is necessary to be condemned in opening a street.

Nowhere in the Act to incorporate the town of Dover is a plot required to be made. "To survey" has several significations. It may mean to inspect or take a view of; to view with attention; to view with a scrutinizing eye; to examine; to examine with reference to condition, situation, and value; to measure as land; and many others. "Survey" as a noun, as in the Act referred to, may mean an attentive or particular view; examination of the land with a design to ascertain the condition, quantity, or value. It certainly does not necessarily mean a paper containing a statement of the courses, distances, and quantity of land; and it does not necessarily mean a plot of land made by a surveyor as such. The Act would seem to contemplate that the survey and location of the street contemplated to be extended, laid out, or widened should be made before or at the time the damages were assessed, and not afterwards. And such seems to have been the view of the town council, if we are to judge from the notice which it gave to Mr. Fulton on the 26th

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day of March, 1886; for in that notice it says: "You are hereby notified that the town council of the town of Dover, at its regular meeting on the 7th day of December, 1885, did resolve to open Queen street from Cecil street to Clara street, of the width of sixty feet, and that they have condemned sixty feet front and 1,260 feet deep of land belonging to you; and that the said council has allowed to you, as damages, the sum of six cents."

It is true this is a general description of the land, and all that the Act requires; but it is not so particular a description of it as that contained in the resolution adopted by the council on the 7th day of December, 1885. It was not on the 25th or 26th of March, 1886, that the town council had determined to locate and lay out or extend Queen street and fix the compensation therefor, but it was on the 7th day of December, 1885, that it did these things. And the Act of Assembly under which it acted declared that it should be its duty, immediately after doing these things, to notify in writing Fulton, the owner of the real estate through which Queen street should run, of its determination to open the same, and to furnish a general description of the location thereof, and the amount of damages or compensation allowed to him.

Now, the 26th of March, 1886, was not immediately after the 7th day of December, 1885. And notice given on the former day was not the notice required to be given by the Act of Assembly. The law sedulously protects a man's freehold. He cannot be deprived of it except in accordance with law. The question is not what was in fact done between the 7th day of December, 1885, and the 26th of March, 1886, but what might have been done.

A man shall not be deprived of the free use of his freehold except in strict accordance with law.

That this is the law in respect to that portion of the

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land of Fulton, between Mary and Clara streets, which the town council, in mockery of justice, proposes to take for six cents, will be apparent on a moment's reflection.

The land is within the town limits of Dover. Between the seventh day of December, 1885,—the date of the condemnation,—and the twenty-sixth of March, 1886, Fulton, in absolute ignorance of the action of the town council, on the first-named day might have commenced, if not have completed, costly buildings and structures and other improvements on said piece of land. He might have expended money on the improvement of said piece of land, in the erection of buildings thereon in the period of time named, greater in amount than all his adjoining land of forty or fifty acres were intrinsically worth. And yet, if the contention of the counsel for the town council be correct, then it would have been competent for the town council, after the expenditure of these large sums of money, and at as late a period as March, 1886, to notify Fulton in writing of its determination to open the street across his land; and that it had, in the previous month of December, generously allowed him damages or compensation to the amount of six cents for so doing.

This is not the court to seek approval of action which might be attended with such consequences.

If the survey contemplated by the Act of Assembly is not held to have been made before or at the time of the condemnation of the land, and of the awarding of six cents damages, then no real survey ever was in fact made. No plot of a survey was required by the Act to be made. It is not pretended that the outside lines, including the strip of land, were in fact run or surveyed.

All that the surveyor is alleged to have done was to strike a line so as to determine the middle of Queen street as proposed to be extended to Clara street, or to

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the new road which had been located on the opposite side to Clara street.

If the notice required to be given was not required to be given immediately in the sense here presented, then the town council might, at its pleasure, have given such notice at any time after the condemnation and before a pretended survey, however distant.

The survey might have been postponed, in this view of the case, for years; and Fulton, in the meantime, remain in uncertainty as to what the ultimate action of the council might be.

I am therefore of opinion, for this reason, that Queen street cannot be extended from Mary street to Clara street, under the proceedings had and taken by the town council as set forth in the paper in this cause.

I shall therefore decree that the preliminary injunction heretofore awarded in this cause, so far as it relates to Queen street, between Cecil street and Mary street, be dissolved; and that, so far as it relates to the land between Mary street and Clara street, it be made perpetual in respect to any proceedings by the town council heretofore taken and had to the same. And it is ordered that the corporation pay the costs in three months.*

*See same case on appeal to Court of Errors and Appeals reported in 11 Cent. Rep. 261.

Syllabus.—Statement.—Argument for complainant.

MATTHEW HAZEL

vs.

ZENAS W. SINEX.

Kent, March T. 1886.

Usurious judgment bond; innocent surety on, protected against enforcement of; exoneration.

1. B borrowed money from S on a usurious contract, giving his judgment bond therefor with H as surety therein. B, the principal, becoming insolvent, S issued an execution against H, the surety, to enforce payment. *Held*, that S should be forever restrained from collecting the amount of the judgment out of the surety. *Held*, further, that it was not necessary for H, the surety, either before bringing his bill or at the trial, to tender himself ready to pay the sum actually lent, with interest; and that the principal and surety stood upon a different footing in this respect.
2. S, a judgment creditor of B as principal and H as surety, issued an execution against B, and levied on goods of sufficient value to satisfy the judgment, but afterwards stayed the same, and permitted B to sell the goods levied on and apply the proceeds to his own use without the consent of H, the surety. *Held*, that the judgment as to H was satisfied in equity, and that S should be perpetually enjoined from proceeding against H, the surety.

INJUNCTION BILL.—The bill seeks to restrain the collection of a judgment.

The facts are stated in the opinion.

Beniah Watson and *Edward Ridgely*, for the complainant:

I. It is clearly settled that an obligation in the hands of an assignee is subject to all the equities which could have prevailed against the original obligee. This principle is too well established to require authorities.

II. A bond executed in blank cannot be filled up

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without special authority of the obligors. *Clendaniel v. Hastings*, 5 Harrington, 408.

If a bond intended as security for \$500 to one were filled up to another for \$1,100, it would be a fraud upon the surety, and a court of equity would discharge him from all liability thereon. *Hastings v. Clendaniel*, 2 Del. Ch. 165; affirmed on appeal, 5 Harrington, 408. So also a bond filled up before it was signed by surety, and diverted from the object for which it was intended without his knowledge, would be a fraud upon the surety, and he would be discharged in equity. For the surety can well say, "*In hæc fœdera non veni.*" *Hastings v. Clendaniel*, *supra*.

One who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he becomes a surety must be presumed to know that such will be his understanding. Brandt, Sur. p. 492, § 366; *Pidcock v. Bishop*, 3 Barn. & C. 605; 1 Story, Eq. § 215.

The concealment of any material facts, which, if known, would prevent the surety from entering into his contract of suretyship, is a fraud upon him; and a court of equity will relieve him from all liability.

III. The note which Sinex held against Blackiston for \$624, which formed a part of the consideration of the bond upon which judgment was entered, was usurious and consequently illegal and void; and no action could have been maintained upon it for the recovery of the money. *Cook v. Pierce*, 2 Houston, 499; *New Port Nat. Bank v. Tweed*, 4 Houston, 225.

Where the original loan or contract is usurious all the securities therefor, however remote or often renewed,

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are void. *Cleaden v. Webb*, 4 Houston, 473; *Tate v. Wellings*, 3 T. R. 537; *Reed v. Smith*, 9 Cow. 647; *Campbell v. Sloan*, 62 Pa. 481; *Bridge v. Hubbard*, 15 Mass. 96; *Pearson v. Bailey*, 23 Ala. 537; *Wales v. Webb*, 5 Conn. 154; *Price v. Lyons Bank*, 33 N. Y. 55.

Independent of the usurious note which formed part of the consideration of the bond, the bond itself was usurious, as Sinex retained \$100 and only paid Blackiston at the time of the assignment \$376, when he ought to have paid him \$476. As this entire transaction between Sinex and Blackiston was usurious and void, and unknown to the surety and contrary to his purpose and object when becoming security for Blackiston on the bond, the surety is in equity discharged. As Sinex was guilty of wrongful and illegal conduct in exacting usurious interest for the money advanced, the loss should more properly fall on him than upon Hazel, who was an innocent surety. *Hayes v. Ward*, 4 Johns. Ch. 123.

IV. The creditor who has effects of the principal in his hands or under his control for the security of the debt is a trustee for all parties concerned; and if such effects are lost through the negligence or want of ordinary diligence of the creditor, the surety is discharged to the extent that he is injured, the same as if the effects had been lost by the positive act of the creditor. In such case he is bound to be diligent in preserving such effects, to the same extent that any other trustee similarly situated is bound. *Brandt*, Sur. 519, 520; *Pitm.* Sur. 138; *Law Lib.* 40; *Phares v. Barbour*, 49 Ill. 371.

If the principal places an obligation of a third person in the hands of the creditor as collateral security for the debt, the creditor is, without any special agreement to that effect, bound to use diligence to collect the same and to charge all the parties thereto; and if anything is lost on account of his failure to use such diligence, not only

Argument for complainant.

the surety but the principal also is discharged, to the extent that he is injured. *Brandt*, Sur. 519; *Slevin v. Morrow*, 4 Ind. 425; *Cummings v. Little*, 45 Me. 183, 187; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; *City Bank v. Young*, 43 N. H. 465; *Williams v. Price*, 1 Sim. & Stu. 582; *Capal v. Butler*, 2 Sim. & Stu. 457; *Wolff v. Jay*, L. R. 7 Q. B. 756; *Hayes v. Ward*, 4 Johns. Ch. 123, 131; *Watriss v. Pierce*, 32 N. H. 560; *Phares v. Barbour*, 49 Ill. 370, 371; *Rogers v. Trustees of Schools*, 46 Ill. 428; *Calloway v. Snapp*, 10 Rep. 696; *S. C.* 78 Ky. 561; *Succession of Pratt*, 16 La. Ann. 357; *Renegar v. Thompson*, 1 Lea, (Tenn.) 457; *Bond v. Ray*, 5 Humph. 492; *Nelson v. Munch*, 28 Minn. 314; *Hurd v. Spencer*, 40 Vt. 581; *Richards v. Commonwealth*, 40 Pa. 146; *Lowndes v. Chisolm*, 2 McCord, 464; *Rathbone v. Warren*, 10 Johns. 586; *Niblo v. Clark*, 3 Wend. 24; *English v. Darley*, 2 Bos. & P. 62; *Willis v. Davis*, 3 Minn. 21.

Where a creditor without being bound to sue or issue execution on judgment does sue and issue his *feri facias* and under that *feri facias* a levy is actually made, the property or effects thus held become answerable for the debt, and the creditor is not at liberty to abandon the hold he has thus acquired; he cannot relinquish the property. And if he does relinquish or abandon the lien, or suffers the property so taken and at his disposal to be squandered or appropriated to other and different purposes, the surety is exonerated. The auditor is not bound to be diligent in obtaining securities for the debt, but, having obtained them, he at once becomes a trustee thereof for all parties concerned. *Brandt*, Sur. 509, 510, § 378; 1 Story, Eq. 2d ed. 322, § 326; *Theobald*, Prin. & Sur. *143; *Houston v. Hurley*, 2 Del. Ch. 248; *Mayhew v. Crickett*, 2 Swanst. 185; *Sherraden v. Barker*, 24 Iowa, 28; *Watson v. Reed*, 4 Baxt. 49; *Baker v. Briggs*,

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8 Pick. 121; *Com. v. Van Derslice*, 8 Serg. & R. 452; *Lichtenthaler v. Thompson*, 13 Serg. & R. 157; *Cooper v. Wilcox*, 2 Dev. & B. Eq. 90; *Winston v. Yeargin*, 50 Ala. 340; *Bank v. Fordyce*, 9 Pa. 276; *Dixon v. Ewing*, 3 Hamm. (Ohio) 281; *Morley v. Dickinson*, 12 Cal. 561; *Maquoketa v. Willey*, 35 Iowa, 323; *Commonwealth v. Haas*, 16 Serg. & R. 252; *Ferguson v. Turner*, 7 Mo. 497; *Dills v. Cecil*, 4 Bush, 579; *Brown v. Riggins*, 3 Kelly, 405; *Pain v. Packard*, 13 Johns. 174; *Bullitt v. Winston*, 1 Munf. 269; *Law v. East India Co.* 4 Ves. Jr. 824; *State v. Hammond*, 6 Gill & J. 157; *Everly v. Rice*, 20 Pa. 297; *Phares v. Barbour*, 49 Ill. 370; *Rees v. Berrington*, 2 Ves. Jr. 540; *Chichester v. Mason*, 7 Leigh, 260; *Harberton v. Bennett*, 1 Beatty, Ir. Ch. 386.

Although a mere stay of execution against the principal, by the creditor, will not release the surety, yet a release of the goods of the principal, levied on under the execution, will discharge the surety to the value of the goods released. *Houston v. Hurley*, 2 Del. Ch. 248.

By the promise of Sinex to satisfy the judgment against Hazel, prior to the public sale of Blackiston's personal property, Hazel was belied into security and was misled to his prejudice and thereby induced to forego the advantage or remedy of paying the debt and taking an assignment thereof against Blackiston, which Hazel in his testimony swears he would have done if no such promise had been made. This constitutes a case of constructive fraud upon Hazel, which operates to his discharge. *Wilds v. Attix*, 4 Del. Ch. 253.

If a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him, if not at law, at all events in equity. Story, Eq. § 325.

Argument for defendant.

George V. Massey, for the defendant:

I. Where a party invokes the aid of a court of equity to be relieved, on the ground of usury, from his contract, he can only successfully do so upon terms,—*i. e.*, that he will pay what is really due under the contract, deducting the usurious interest. 1 Story, Eq. ¶ 301, and cases cited in footnote; *Pearson v. Bailey*, 23 Ala. 537.

II. Although the judgment in controversy was entered on a bond with warrant of attorney tainted with usury, it is not therefore void at law; and relief against the usury can only be had in chancery; and such judgment will, in a court of equity, be regarded as a valid security for the money actually loaned and advanced, with lawful interest. *Pearson v. Bailey*, 23 Ala. 537; *Fanning v. Dunham*, 5 Johns. Ch. 142; *Beach v. Fulton Bank*, 3 Wend. 584, 585.

III. The creditor is not bound to any active diligence or effort to enforce payment from the principal debtor. 2 Story, Eq. § 326, and notes; Adams, Eq. pp. 570–572, and notes; *Rees v. Berrington*, 2 Lead. Cas. Eq. *974, 1009; *Wilds v. Attix*, 4 Del. Ch. 253.

Indulgence will not relieve surety. No agreement for delay or further time, unless predicated upon a consideration which could be enforced by the principal debtor against the creditor, will avail the surety. A stay of execution will not do so. *Houston v. Hurley*, 2 Del. Ch. 248; *Rees v. Berrington*, 2 Lead. Cas. Eq. *1009; *Janvier v. Sutton*, 3 Harrington, 37, and note; *Hickman v. Hickman*, Id. 484.

IV. While it is not admitted that there is any sufficient proof to establish any promise, on the part of the creditor in this case, to release the surety, it is contended that such promise, if satisfactorily proved, could not avail the complainant for the following reasons: (1) There was no consideration to support it, and it is therefore

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nudum pactum; (2) being without consideration the complainant did not and could not rely upon it; (3) the theory of constructive fraud cannot be maintained, because it is not sufficiently proven that the complainant had taken any steps toward other means for his indemnity, which he would have adopted but for his reliance on the defendant's promise; (4) the burden of proof is on the complainant clearly to establish such promise, and also that he was thereby prevented from taking other steps for indemnity which he was about to take, and would have taken but for such promise. *Wilds v. Attix*, 4 Del. Ch. 263.

THE CHANCELLOR.—The complainant in this cause seeks to restrain the defendant from the collection, by execution process, of the amount of a judgment, being \$1,100, with interest from the 14th day of December, 1872, and costs. This judgment purports to have been entered by confession on warrant of attorney.

The complainant states in his bill that on or about the 19th day of May, 1873, he was called upon by Benjamin F. Blackiston, who stated to him that he (Blackiston) had made arrangements with Zenas W. Sinex, the defendant, to borrow of Sinex the sum of \$500; that Blackiston requested the complainant to become his surety for said loan, at the same time stating that Edward Beck would become his cosurety; that the complainant consented to become cosurety with the said Beck for the said Blackiston for the loan about to be made to him by the said Sinex; that Blackiston and he were in the field on his premises at the time of the conversation between them; that Blackiston produced pen and ink and a blank judgment bond,—the blanks therein being for the names of the obligor, obligee, amount, date, and time of payment; that the complainant then and there signed the said

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blank judgment bond opposite the second seal at the bottom thereof, and handed the same back to said Blackiston, when said Blackiston left the complainant in the field to pursue his work of ploughing.

The complainant avers in his bill that when he signed the printed blank judgment bond, neither the said Blackiston nor the said Beck had signed the same; and that the blanks in said bond for the names of the obligors, obligee, amount, date, and time of payment were then unfilled. He also avers and charges that the sole purpose and intention for which he signed said blank printed judgment bond was to enable the said Benjamin F. Blackiston to borrow of the said Zenas W. Sinex about \$500, and for no other intention or purpose whatsoever, and that it was his understanding at the time he signed said blank judgment bond as surety for said Blackiston that the same was to be made payable to the said Zenas W. Sinex; that the real debt thereof was to be about \$500, and that the same was to bear date on or about the day on which it was signed by him, to wit, on or about the 19th day of May, 1873.

The complainant also states that after he had so signed and handed back the said bond to Blackiston, he heard nothing of it until some time after the 6th day of March, 1874, when he learned that a judgment had been entered against him in the Superior Court of the State of Delaware in and for Kent County, at the suit of Zenas W. Sinex, assignee of Martin L. Smith, for the real debt of \$1,100, with interest from the 14th day of December, 1872; and about the same time learned that judgments had also been entered severally in said court against said Benjamin F. Blackiston and the said Edward Beck, at the suit of Zenas W. Sinex, assignee of Martin L. Smith, for like amount; and that upon inquiry he learned that the blanks in said judgment bond, which he had signed

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as surety for said Blackiston in blank, had been filled by inserting the name of Martin L. Smith as the obligee, instead of Zenas W. Sinex, and by inserting the sum of \$1,100 as real debt thereof instead of about \$500, and by antedating the same so as to make it bear date as the 14th day of December, 1872, instead of about the 19th day of May, 1873, when, in fact, it was signed by the complainant.

The complainant expressly avers and charges in his bill that the name of Martin L. Smith was inserted as the obligee in said blank printed judgment bond; that the real debt thereof was made \$1,100 instead of about \$500; and that the same was antedated so as to bear the date of the 14th day of December, 1872, instead of about the 19th day of May, 1873, without his knowledge or consent, and contrary to his distinct understanding when he consented to become surety for the said Blackiston as aforesaid, and when he signed the said blank printed judgment bond as such surety.

The bill then charges that no consideration whatever was ever given or paid, or agreed to be given or paid, by the said Martin L. Smith to the said Benjamin F. Blackiston, for the said judgment bond; and that the same as between the said Benjamin F. Blackiston and the said Martin L. Smith was without consideration; and the said Zenas W. Sinex never paid or agreed to pay to the said Martin L. Smith any consideration whatever for the assignment to him, by the said Martin L. Smith, of said judgment bond; and that as between the said Zenas W. Sinex and the said Martin L. Smith the said assignment of the said judgment bond was wholly without consideration; that the said Zenas W. Sinex and said Benjamin F. Blackiston had made as between themselves a corrupt and unlawful agreement and bargain, whereby the said Zenas W. Sinex was to take for the loan or use of the

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money he was about to lend to the said Benjamin F. Blackiston more than \$6 for the loan or use of \$100 for one year, and in that proportion contrary to the statutes of the State of Delaware against the taking of usurious interest; and for the purpose of evading such statutes he the said Zenas W. Sinex, suggested to the said Blackiston that the name of Martin L. Smith should be inserted as the obligee in said bond, and that the same should be assigned by the said Smith to the said Sinex; and that in pursuance of said corrupt and unlawful agreement and bargain the said Zenas W. Sinex did procure the said Martin L. Smith on the 19th day of May, 1873, to assign said bond to the said Sinex; and that said corrupt and unlawful agreement and bargain was entirely unknown to the complainant at the time he signed the blank printed judgment bond as aforesaid; and that he learned about the same after the 6th day of March, 1874, and after the said judgment had been entered against him in the said superior court as aforesaid.

Sinex, the defendant, in his answer and testimony, denies all knowledge of the circumstances under which the bond was executed, and of the bond, until about the time the same was assigned to him.

Blackiston, who was examined as a witness on the part of Sinex, denies that the bond was signed by the complainant in blank, and says that when the complainant signed the bond all the blanks therein were filled up as they were at the time of his examination as a witness.

The proof, therefore, on this subject is equally balanced, Hazel, the complainant, and Blackiston, the witness, swearing directly the contrary in respect thereto.

Blackiston, in his answer to the second cross-interrogatory to the third interrogatory in chief, says: "As I have already stated in my answer to the third interrogatory in chief, the consideration for the assignment of the

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said bond by Smith to Sinex was a note for \$624, which Sinex then held of mine and which he gave up to me at the time of the assignment, and \$376 in money which he paid me in cash at the time of the assignment. This note of \$624 represented two notes that I had previously given Sinex,—one for \$500 for a loan of \$440, and the other for \$100 for a loan of \$80; and \$24 in money which I had agreed to pay Sinex for the renewal of the note of \$100. These two notes and \$24 had been merged into one note for \$624. This note of \$624 is the note which Sinex gave me at the time of the assignment. No consideration for the assignment of said bond passed from the said Sinex to the said Smith. All the consideration that passed for the assignment of the said bond passed from the said Sinex to myself; and the said Martin L. Smith, the obligee in and assignor of said bond, received no consideration for said assignment.”

Sinex, the defendant, who was examined as a witness on his own behalf, in his answer to the second cross-interrogatory to the complainant’s third interrogatory, says: “The consideration for the assignment of said bond was two notes which, at the date of assignment, I held against the said Blackiston,—one for \$500 and the other for \$100,—which I gave up to him at the time of the assignment, and my note or due bill (the amount of which I do not now remember) which I gave Blackiston at the time of the assignment and which I afterwards paid to Blackiston in different installments, and the sum of \$22, being the interest which had accrued on the bond up to the assignment and which I also afterwards paid him. No consideration passed from me to the said Martin L. Smith, the assignor, for the assignment of the said bond, but the whole consideration for said assignment passed from me to the said Benjamin F. Blackiston. The said Martin L. Smith received no consideration for said assignment.”

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In fact there was no money paid to Blackiston at the time of the assignment, and no consideration for it, except the notes which Sinex held against him, and Sinex's note for the difference between them and \$1,000. The \$100 making \$1,100 being allowed, as Sinex modestly states, as discount to Sinex on the judgment note or bond, the execution of which is sought against the complainant. Instead of discount Sinex should have called it by its right name, usury.

It is nowhere pretended that Blackiston or Hazel and the other surety owed Martin L. Smith anything. On the contrary it sufficiently appears, from the testimony in this cause, that Martin L. Smith had no real interest whatever in the judgment bond which he assigned to Sinex. Sinex says (or perhaps it was Blackiston; it was, however, one or the other of them) that Blackiston had been trying to negotiate this bond or raise money upon it through Smith, but failed to do so. Blackiston also states that Sinex promised to give him the money on the bond when it should be assigned to him, but did not do so, and that the consideration for the assignment was that which he discloses in his testimony. It is evident that Smith had no assignable or real interest in the said bond; and for aught that appears to the contrary he was a mere go-between, between Blackiston and Sinex.

Sinex's defense to the complainant's bill is covered all over with usury, and has no merit in law or equity. According to the testimony of Blackiston, his own witness, every ingredient in the consideration for the assignment was fraudulent and usurious. The notes of which Blackiston speaks, and the notes which Sinex says he delivered up to Blackiston, in part consideration of the assignment of the bond upon which these several judgments were entered, as well as the bond itself, were usurious, and, according to decisions of the courts of law in

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this State, were absolutely void. To an assignment of them usury might have been pleaded.

It is true that in a court of equity a party seeking to avoid the payment of a usurious debt must tender in his bill the amount really and truly due; for he that seeks equity must do equity. And a party to the usury shall not be relieved against a usurious transaction, unless he tenders himself ready to pay the amount truly and justly due. But this applies to a party to the usury, to the borrower, not to the surety, if he be not a party to the usury and is ignorant of all knowledge in respect to it. Such an one may be relieved without tendering himself ready to pay anything; therefore, the complainant in this case was not bound to tender in his bill himself ready and willing to pay, and was not bound to pay the \$376 in money, for which amount Sinex gave his due-bill or note, and which he afterwards paid. The whole transaction between Sinex and Blackiston was fraudulent and void at law, prohibited by the Acts of Assembly; and it has no merits in this court. And for this reason I decide that Hazel, the innocent surety, is not bound to pay the judgment, which is sought to be put in force against him.

Upon the second point maintained by the complainant, that the stay of the execution by Sinex against Blackiston is a discharge against him as surety, I remark that: (1) the law favors a surety and watches his position and his rights; (2) as a general rule an implication that he is discharged is raised, if the creditor and principal debtor by agreement vary the terms of the original contract, or if the creditor takes a new security from the principal debtor in the place of the old one, or if the creditor discharge the principal debtor, or if the creditor discharge a cosurety, or if the creditor give time to the principal debtor; (3) the surety is, generally speaking, discharged

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through the fault of the creditor in releasing securities received by the creditor from the principal debtor; (4) an abandonment of the creditor of an execution against the principal releases the surety, because the creditor is a trustee of the execution (*Mayhew v. Crickett*, 2 Swanst. 185. See also 3 Esp. 49, 50; 2 B. & P. 61; *Williams v. Price*, 1 Sim. & Stu. 581); (5) in order to effect the discharge of the surety, it must appear both that there has been a loss, and that such loss was caused by the fault of the creditor.

It was decided in *Miller v. Porter*, 5 Humph. 294, that a mere stay of execution by the plaintiff will not discharge the surety from the debt; and in *Springfellow v. Williams*, 6 Dana, 236, that the mere act of staying an execution by the creditor, without any restrictions upon the right to issue another immediately, does not discharge the liabilities of the sureties of the debtor. And it is said in *Bailey v. Gould*, Walk. Ch. 478, that a creditor may extend the time for his debtor to pay him without discharging the sureties, if he, by the same agreement, in express terms, reserves his remedy against him.

It was said in *Buchanan v. Bordley*, 4 Harr. & McH. 41, that a mere forbearance to sue the principal, which a court of equity on application of the surety might direct the creditor to do, upon pain of foregoing his claim against a surety, is not sufficient.

In *Cooper v. Wilcox*, 2 Dev. & B. Eq. 90, it appears that an execution was in the sheriff's hands against one Alston, a principal debtor, and that when the return day of execution was at hand, and the sale about to take place, Wilcox, the plaintiff, upon the prayer of Alston, and without the knowledge of his sureties, directed the sheriff to forbear the sale and return the execution indulged upon Alston's paying the costs, sheriff's commission, and \$128 in part of the debt. Upon this arrange-

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ment being made, the goods were left with Alston and afterwards were either disposed of by him, or taken by other creditors and sold at execution. Now the payment of the costs, sheriff's commission, and \$128, was in relief of the sureties to that extent, and was not something additional paid to the principal in consideration for his forbearance.

Gaston, *Judge*, upon this statement of facts, said: "There is nothing in the relation of principal and surety between two persons directly liable to the creditor, which imposes on him the duty of active diligence against the principal debtor. Mere forbearance or delay in collecting from the principal debtor furnishes no ground on which the surety can ask for exoneration. But if the creditor do any act for the ease of the principal, without the privity of the surety, by which act the surety is injured or exposed to injury, that act may be laid hold of for the surety's relief. One has not the right to be charitable at his neighbor's cost. The creditor stepping forward to relieve the principal should remember the situation of the surety, and not extend this relief to his injury without his assent—unless he choose to release the surety. Accordingly it is well settled that if the creditor, from benevolence or favor to the principal debtor, relinquish a security which he has for the debt, or gives up funds in his hands applicable to its payment, the surety will be exonerated to the extent of that security, or of those funds. Thus in *Mayhew v. Crickett*, 2 Swanst. 191, it was holden to be clear that if a creditor takes the goods of the principal debtor in execution, and afterwards withdraws that execution, he discharges the surety *pro tanto*. So in *Law v. East India Co.* 4 Ves. Jr. 829, it was considered as incontestable that where a creditor has a fund of the principal debtor, sufficient for the payment of the debt, and gives it back to the debtor, the surety can never

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afterwards be called upon. The creditor by virtue of the seizure in execution or of the deposit becomes a trustee of the security so acquired, or of the fund for the benefit of all concerned, and is responsible to any party injured by unfaithfulness in execution of that trust; for it is a rule that if he be not only creditor, but trustee, then even his neglect, if it occasion the loss of that to the benefit of which the surety is entitled, will *pro tanto* discharge the surety. *Capal v. Butler*, 2 Sim. & Stu. 457; 1 Cond. Eng. Ch. Rep. 543."

In applying the principle to the case before him, *Judge Gaston* further remarked: "After Wilcox had levied his execution on Alston's goods, these became a specific and full security for the payment of the debt; and this security, out of benevolence to Alston, he has relinquished, or at all events has by his act rendered ineffectual. In justice he must be regarded as having thus interfered with the collection of the debt at his peril, and not at the risk of those who neither consented to the course pursued nor were consulted respecting it. The principle is spoken of as one of equity, but it prevails in all courts where the relation of principal and surety can be recognized. It is in truth but a consequence of the moral injunction so to exercise one's rights as not to injure others."

The case of *Cooper v. Wilcox* was, in my opinion, properly decided.

In the case of *Mayhew v. Crickett*, 2 Swanst. 193, it appears that the defendants entered up judgment on a warrant of attorney against Batterly, and issued an execution thereon, and entered into possession of his dwelling-house and the stock in trade and other effects therein; and after continuing several days in possession without consulting or apprising the plaintiffs, who were sureties of Batterly, withdrew the execution, Batterly paying the

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expenses. Batterly becoming embarrassed, the sureties were called upon for payment, which they refused. The *Lord Chancellor*, among other things, said: "I always understood that if a creditor takes out execution against a principal debtor, and waived it, he discharges the surety, on an obvious principle, which prevails both in courts of law and in courts of equity."

The principle, in a subsequent part of his opinion, he states to be that a party taking out his execution is a trustee of his execution for all parties interested.

In the syllabus of the case of *Houston v. Hurley*, 2 Del. Ch. 248, it is said: "A surety in a debt for which judgment is recovered against a principal is not discharged by a stay of execution, if such stay is required by statute; . . . nor is such surety discharged by a mere stay of execution after a levy." *Chancellor Harrington*, in his opinion in this case, says: "A surety is not discharged by mere indulgence or delay in suing or executing the principal. Lifting the levy and releasing the goods levied on is another thing, and is an injury to the surety to the amount of the property released. If the benefit of some securities for a debt is lost by the neglect of the creditor, the surety is *pro tanto* discharged. I am therefore of opinion that the release of this levy on *Houston's* goods was an injury to his surety; and, being without his consent, it is a release of his obligation of suretyship to the extent of the value of the goods given up. . . . But I do not know of any decided case, and cannot perceive any principle of equity, that will make such a stay of proceedings and release of goods levied on an absolute release of the surety. It does him no wrong beyond the value of the goods released. The creditor has the right to forbear execution, and the surety has a remedy, if he desires it, to obtain further execution."

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This opinion, however, does not meet the precise question raised in this case, which is not whether a surety is discharged by mere indulgence of delay in issuing or executing the principal, or whether the release of a levy against the goods of a principal debtor, without the consent of a surety, is a release of the obligation of a suretyship to the extent only of the goods given up. The question is whether Sinex, the judgment creditor,—having sued out his execution against Blackiston, the principal debtor, and having thereunder levied upon his goods and chattels sufficient to pay the debt; and having after the levy under the *feri facias* issued a *venditioni exponas*, and advertised the goods and chattels for sale; and having, as we may reasonably infer from the testimony of Blackiston, caused the advertisement of sale to be torn down; and also having before Blackiston's public voluntary sale, about the 2d day of February, 1877, indorsed on the *venditioni exponas* which followed the *feri facias* theretofore issued, under which Blackiston's goods, etc., had been levied upon, a direction to the sheriff in these words: "Stay this writ till further orders, Feb. 2, 1875. Z. W. Sinex," so that no further execution might be issued until the ensuing term of the superior court, or the said writ of *venditioni exponas* be further prosecuted, without his further orders; and there being no indication on his part of keeping his execution under his own control so that he might, if he chose so to do, order the sheriff to proceed thereon before said ensuing term of said court; and the execution having been returned "stayed" to said court without any intervention of his to the contrary; and he not having thereafter caused any further writ to be issued upon said judgment; and the goods and chattels of Blackiston having been, after the time of the stay of the execution, extensively advertised by said Blackiston for public sale, and sold by him at

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such sale (which was early in the month of February, 1877), which was about two years after the writ of *venditioni exponas* had been stayed by the said Sinex, and while said levy was alive and in full force; which public sale by Blackiston was in the neighborhood of the residence of said Sinex, and the said goods not having been caused to be followed by the said Sinex,—has not, by his acts and indulgence to the principal debtor, Blackiston, without the consent of Hazel, the surety, injured the surety to the extent of the value of Blackiston's goods so levied upon; and whether the surety is not thereby *pro tanto* discharged, and in fact fully discharged,—the value of the goods levied upon in this case appearing to have been sufficient to pay the debt.

This precise question has never, to my knowledge, been decided in this State. The case of *Houston v. Hurley* certainly does not decide it.

This is a much stronger case, in my opinion, than the case of *Cooper v. Wilcox*, 2 Dev. & B. Eq. 90, decided by Judge Gaston. In that case the plaintiffs simply directed the sheriff to forbear the sale, and returned the execution “indulged,” upon Alston's paying the costs, sheriff's commissions, and \$128 in part of the debt. In this case the return made to the court was “stayed by order of the plaintiff.”

I do not decide that the mere order of a plaintiff to stay an execution while the same shall be in the hands of the sheriff, under the control of the plaintiff therein, and subject to any further order he may make in respect to it, and free from all suspicion of fraud, will in itself discharge the surety. But I am of opinion that,—considering all the circumstances of the case, and all the facts in this cause, and the value of the goods of Blackiston levied upon as the principal debtor under the execution of Sinex,—the public sale of these goods by Blackiston,

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owing to the stay of execution by Sinex before the sale by Blackiston,—no further execution having been issued after the stay of the *venditioni exponas* two years before the dispersion of said goods by said sale, which was in the immediate neighborhood where Sinex resided; and no attempt having been made by Sinex to cause his execution to be made effectual after he had ordered it stayed, and before the ensuing term of court; and the failure of Sinex to cause said goods to be followed under his levy, which had not then expired,—were evidence, to be considered by this court, of fraud, and of his intention to injure the complainant, the surety, and to cause the debt to be paid by him instead of the principal. He must be held to have actively interfered with the proper execution of his writ, and to have willfully suffered and permitted the dispersion of the goods of the principal, to the injury of the surety, and thus to have released the surety from liability in equity to pay the debt.

It is no answer to say that Hazel might have paid off the judgment and taken an assignment of it, and made the amount of the execution out of the goods and chattels of Blackiston.

It is true Hazel swears that he would have done so, had he not been misled and deceived by Sinex, who had promised to satisfy the judgment against him. He was not bound to pay off the judgment and take an assignment of it, because the judgment was fraudulent and void in law, according to the decisions of the law courts in this State. And upon the attempt being made by him, as assignee thereof, he would have been or might have been, met with this patent objection.

The right, under our Act of Assembly, of a surety to pay off a judgment and take an assignment of it, and collect the amount thereof in the name of the plaintiff therein, or as his assignee, does not deprive the surety of

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the right of subrogation, or any other right which he may have in respect thereto in this court. In the present case, as in any other case, this court would compel the plaintiff in the judgment, upon being indemnified against costs by the surety, to proceed at law against the principal therein, to make the amount of the debt out of the goods and chattels, lands and tenements, of the principal debtor.

Sinex, the creditor in this case and plaintiff in the judgment, attempted to do, without an order of this court and without security against costs, what a court of chancery would have compelled him to do, upon application of the surety. Can it be doubted that in case he had proceeded, under an order of this court, to collect the debt, and had stayed his execution, and the goods and chattels of Blackiston in consequence thereof had been sold and dispersed, and Hazel, the surety, had thereby suffered an injury to the extent of the value of said goods and chattels, the surety would not thereby have been discharged? Where is the difference in principle between acting under an order of this court, and acting voluntarily without an order of this court? Would he not be a trustee of his execution for all parties interested as well in the one case as in the other? If not, why not?

I shall decree the preliminary injunction, heretofore ordered, to be perpetual.

Syllabus.—Statement.

JACOB RUBENCANE, Trustee,

vs.

ELWOOD B. MCKEE, Administrator, *et al.*

New Castle, Sept. T. 1886.

Wills; vested legacy.

1. A testator bequeathed as follows: "I give and bequeath unto my friend Jacob Rubencane the sum of \$1,200; in trust; nevertheless, to pay the interest thereof unto my niece, Annabella Town, half-yearly for and during her natural life, . . . and from and immediately after the decease of the said Annabella Town, to pay the said principal sum of \$1,200 to the child or children of the said Annabella Town, free and discharged from this trust." The remainder of his estate was devised to his nephew James W. Ball, who was appointed executor. The testator died in 1851. Annabella Town died in October, 1885. She had two children, Anna T., born in 1844, and James, born in 1852. Anna T. married in 1869 and died in April, 1885, leaving a husband and one child. James died in 1855, when about three years of age.
Held:

(a) That the legacy vested at the death of the testator in the children of Annabella Town, whether they survive their mother or not.

(b) That on the death of Annabella Town, the administrator of the children took their respective shares by right of representation, and the trustee must pay them the trust fund accordingly.

2. The general rule is that a legacy in the form of direction to pay, or to pay and divide at a future period, vests immediately, if the payment be postponed for the convenience of the estate or to let in some other interest.

BILL OF INTERPLEADER.—The bill is brought by Jacob Rubencane, trustee of a fund under the will of John McKnight, deceased, against Elwood B. McKee, administrator of Anna T. McKee, and of James Town, deceased, and Charles M. Newlin, administrator *de bonis*

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non cum testamento annexo of John McKnight, deceased, to determine conflicting claims to such fund.

The facts are stated in the opinion.

Benjamin Nields for the trustee.

Lewis C. Vandegrift for Newlin, administrator.

THE CHANCELLOR.—Jacob Rubencane, the complainant, as trustee under the last will and testament of John McKnight, deceased, has filed his bill against the defendants, praying that they may be decreed to interplead and settle between themselves their rights in respect to the sum of \$1,200 mentioned in the fourth item of the last will and testament of John McKnight, late of Mill Creek Hundred, New Castle County, this State.

Said fourth item is in the following words: "I give and bequeath unto my friend Jacob Rubencane the sum of \$1,200; in trust, nevertheless, to pay the interest thereof unto my niece, Annabella Town, half-yearly, for and during her natural life, without being subject to the debts, control, or interference of any present or future husband she may take, and her receipt alone to be a sufficient discharge; and from and immediately after the decease of the said Annabella Town, to pay the said principal sum of \$1,200 to the child or children of the said Annabella Town, free and discharged from this trust. And my mind and will is, and I do hereby charge all my real and personal estate with the payment of the legacies or bequests hereinbefore mentioned."

The fifth item of the will is as follows: "All the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath unto my nephew, James W. Ball, his heirs and assigns forever, charged and chargeable with the payment of the said legacies or bequests as hereinbefore provided."

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James W. Ball was appointed executor of the will.

Annabella Town had a child born in the lifetime of the testator, in 1844, named Anna T. McKee. The testator died in 1851. Annabella Town had another child born after the testator's death, 1852, named James Town.

James Town died about 1855, aged three years.

Anna T. McKee married Elwood B. McKee in 1869, and died April 24, 1885, leaving to survive her her said husband, Elwood B. McKee, and one child, Francis T. McKee.

Annabella Town died October 6, 1885, without having had any other child or children.

The legacy of \$1,200 was paid to the complainant, Jacob Rubencane, the trustee of the same, named in the will. This \$1,200 is claimed by Elwood B. McKee, administrator of Anna T. McKee, deceased, and administrator of James Town, deceased; and also by Charles M. Newlin, administrator *de bonis non cum testamento annexo* of John McKnight, deceased, defendants in the bill of interpleader.

The question is, Did Anna T. McKee, the child of Annabella Town, born in 1844, in the lifetime of the testator, and James Town, a child of said Annabella Town, born after the death of the testator, take vested interests in the bequest of \$1,200, the interest of which was to be paid by the trustee to their mother, Annabella Town, during her lifetime? And did their interests respectively survive to their administrator, they having died in the lifetime of their mother? Or did the said legacy lapse or become a portion of the estate of John McKnight, the testator, deceased? And is the same payable to his administrator *de bonis non cum testamento annexo*?

It is impossible that it should have lapsed, because the

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interest thereon was payable to the complainant as trustee, during the lifetime of Annabella Town, which did not occur until October 6, 1885. This sum was in the hands of its trustee, named in the will from about 1852 until the present time, having been paid to said trustee by the executor of John McKnight, the testator, about the first-named period.

If the said \$1,200 does not belong to the administrator of Anna T. McKee and James Town, children of Annabella Town, then it belongs, under the residuary clause of the will, to James W. Ball. John McKnight did not die intestate as to any portion of his estate. He bequeathed and devised his whole estate, real and personal, to the person named in his will. The \$1,200 mentioned in the fourth item of his will was given to Jacob Rubencane, in trust to pay the interest thereof unto his niece, Annabella Town, half-yearly, for and during her natural life. "And from and immediately after the decease of the said Annabella Town, to pay the said principal sum of \$1,200 to the child or children of the said Annabella Town, free and discharged from this trust."

The bequest of the principal sum was not to Annabella Town during her life, and from and immediately after her decease to any child or children of hers who might survive her; but the *corpus* of the \$1,200 was devised to Jacob Rubencane in trust; not to pay that sum, but to pay the interest upon that sum to Annabella Town, half-yearly, during her natural life, and then "from and immediately after her decease to pay the said principal sum of \$1,200 to the child or children of the said Annabella Town, free and discharged from this trust."

Can there be any doubt that had Anna McKee—who was born in the lifetime of the testator and survived him until April 24, 1885, and died only about six months be-

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fore her mother—survived her mother she would have been entitled to a share in this \$1,200, the interest of which was to be paid to her mother during her natural life, “and from and immediately after her decease to be paid to her child or children?”

Was the surviving of her mother, made a condition to her having any interest in the principal sum of \$1,200, made a condition by the testator in the bequest? If not, how is such a condition created?—and how can such a condition be implied?

The same questions are applicable in respect to the interest of James Town, the child of Annabella Town, who was born after the death of the testator and died in 1855, aged about three years.

If the interest in the principal sum of \$1,200 was a vested interest in these children, respectively, then it mattered not whether they survived their mother or not. They were both children of Annabella Town. Had they survived their mother they would have been entitled to receive from the trustee the said sum of \$1,200. Having died before their mother, their interest, respectively, in said sum survived to their administrator.

In the case of *Conwell v. Heavil*, 5 Harrington, 296, it was decided that a bequest to A, B, and C, at the marriage or decease of the testator's sister, to each \$300 in cash, to be paid them by his executor, was held to be a vested legacy in A, B, and C. In that case Elias Conwell, one of the legatees, died after the testator, but before the death or marriage of the testator's sister, who died unmarried.

The law applicable to such cases was thus stated by Chief Justice Booth in the case referred to: “When a legacy is directed to be paid at a future time, or on a future event, it is vested or contingent, according to the intent of the testator, as expressed in his will. If the

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time or event is annexed to the payment of the legacy, it is vested; if to the substance or gift of the legacy, it is contingent; because such appears to be the intention of the testator. Therefore, if a legacy be given to a person, payable or to be paid at or when he shall attain the age of twenty-one years, or at or upon any other definite period or event, the legacy becomes vested immediately upon the testator's death, and is transmissible to the executors or administrators of the legatee, although he dies before the time of payment. But if the words 'payable' or 'to be paid' are omitted, and the legacy is given at twenty-one, or at or upon any other future period or event, the interest is contingent, and depends for its vesting on the legatee being alive at the period or event specified."

The case in 5 Harrington and the present case are very similar in their facts, and the law applicable to each is the same.

The payment of the legacy of \$1,200, the right to which is in controversy in this cause, must be considered as postponed for the convenience of the estate, that the interest on the same might be paid to Annabella Town during her life.

It was not postponed on account of the age, condition, or circumstances of her children, who were to take the principal sum at her death.

The general rule on this subject is that a legacy in the form of direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate or to let in some other interest. Hawk. 232.

Now it is manifest, from the terms of the bequest, that the only reason why the legacy of \$1,200 was postponed to the period of the death of Annabella Town, was that the interest might be paid to her for her life, free from

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the control of her husband ; and to secure this interest to her, the principal sum was given in trust to Jacob Rubencane, to pay the interest to her half-yearly, and from and immediately after her death to pay the sum held in trust by him to her child or children.

I think that there can be no doubt that a proper construction of this will requires that Rubencane, the trustee, should pay the legacy of \$1,200 to the administrator of the children of Annabella Town, although she survived her children, because their interests, respectively, in said sum, were during their lives vested, and not contingent.

Let a decree be drawn accordingly.

Syllabus.—Statement.—Attorneys' names.—Opinion.

ANN B. FORMAN

vs.

PETER J. FORD, THOMAS FORD, and THOMAS F. RYAN.

New Castle, at Chambers, Dec. 15, 1886.

Pollution of natural stream; injunction.

A preliminary injunction—restraining the use, when completed, of a building in course of erection, as a morocco factory, so as to pollute and render unfit for domestic and agricultural purposes the waters of a natural stream, to the use of which in its natural condition, the owner of land through which it passed was entitled—*made perpetual by consent.*

BILL FOR AN INJUNCTION.—The facts are stated in the opinion.

Victor Dupont, Edward G. Bradford, and Willard Saulsbury, Jr., appeared for the complainant.

William C. Spruance and George Gray, for the defendants.

THE CHANCELLOR.—The complainant is the owner of a farm or tract of land situate in Christiana Hundred, containing about one hundred and ten acres, through which a natural stream of water, known as Silver Brook, flowed until it emptied into another stream in said Hundred, known and commonly called Mill Creek; which creek finally discharges its waters into the Christiana River, in said county.

The present and prior owners and tenants of said farm have from time immemorial used and enjoyed the waters of said stream called "Silver Brook" in their natural, pure, and unadulterated condition, for watering livestock and for general farming, agricultural, and domestic

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purposes; and for these purposes the waters of said stream seem to have been sufficient.

The bill alleges that the complainant is dependent on said stream for water for the purposes aforesaid, and that no other convenient or practicable means existed therefor on said farm.

It avers that the waters of said stream, run, or brook, from its entry on said farm to its junction with Mill Creek, are and ever have been of sufficient quantity and purity for the use of livestock, farming, agricultural, and domestic purposes on said farm of the complainant and on the several farms or tracts of land through or along which said stream run, or brook flows, until its junction with said Mill Creek; that it is of great importance to the complainant and others using the waters of said stream for like purposes; that the waters thereof should remain in a pure and unpolluted condition; that said stream or run in its ancient course flows for a short distance through and over certain lands recently included, by legislative enactment, within the limits of the city of Wilmington, and forming the extreme western, or southwestern, portion of the territory of said city.

The defendants, the bill states, are engaged in erecting a building to be used and peculiarly adapted for a morocco factory, on the banks, or in immediate proximity to, the said stream or run, and have built into the foundation walls of said building six iron pipes of considerable dimensions, which project over the ancient bed of said stream, and through which impure and foul water, used in connection with the manufacture of morocco, and containing decayed animal matter and certain mineral poisons, and the general refuse of a morocco factory, consisting of divers other foul, noxious, offensive, and polluting substances, will be discharged in large quantities from day to day into the said stream, or run, if the

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said building shall be completed and used for the purpose for which it is intended, and being constructed, namely, the manufacturing of morocco.

The bill charges that the discharge from the proposed morocco factory of such impure water and refuse, and poisonous substances, will pollute the waters of said stream, and render them unfit for their accustomed uses aforesaid, and render the tract of land and farm less valuable, and will be of irreparable injury to the complainant.

It appears that the complainant, together with other owners of land on said stream, caused written notice to be served on the defendants, warning them to abstain from the pollution of the waters of said stream; and that they should insist, by all legal and equitable means, upon their rights to the use of the same, in their accustomed pure and unpolluted condition. Notwithstanding said notice, the defendants continued the erection of their said factory and building.

Upon the above statement of facts, the chancellor granted a preliminary injunction restraining the defendants, until further order of the court, from using or permitting to be used the said building, when erected, as a morocco factory, from which would be discharged into said stream, or run, any impure or foul water used in connection with the manufacture of morocco, or containing decayed animal matter, blood, lime, tanic acid, mineral poison, excrement of animals, or any noxious or offensive refuse mentioned in said bill.

The answer filed by the defendants in the cause admits the title of the complainant to the farm or tract of land, and the location thereof and the receipt of said notice, but alleges that the said morocco factory is more than three thousand feet above said farm of complainant, and states that the water of Silver Brook, in flowing that

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distance, will become so purified as to render innoxious any matter which might be discharged from said factory in said stream. And they deny that any matter or thing will be discharged from the said factory which will be a material, substantial, and irreparable injury to the said complainant in her use of the water of said Silver Brook for the purposes in said bill mentioned.

They deny that they will discharge, or permit to be discharged, from said morocco factory, directly or indirectly into the waters of said Silver Brook, any noxious or offensive matter or refuse, or any impure or foul water which will so pollute, discolor, or injure the waters of said brook as to render them unfit for watering livestock and for general farming, agricultural, and domestic purposes; and say that most of the things described in said bill as noxious and offensive refuse will be saved and utilized by the defendants, and that the others of them, even if discharged into the waters of said Silver Brook, would not so pollute, injure, or discolor the said waters as to render them unfit for the watering of livestock and the other purposes in the said bill mentioned.

They also say, in their answer, that they have made and will make such arrangements and devices as will, in their opinion and in the opinion of experienced and competent persons whom they have consulted, effectually prevent the discharge from said factory of any matter or thing which will so pollute, foul, or discolor the waters of said Silver Brook as to render them unfit for the use of the complainant for the purposes in said bill mentioned.

They also state that the rights and duties of the complainant and defendants in respect to the waters of said Silver Brook have never been ascertained or established by an action at law; and that the apprehended injuries complained of in said bill are such as are susceptible of adequate pecuniary compensation in damages; and that

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they are ready and willing and abundantly able to pay any damages which may at any time hereafter be sustained by the complainant by reason of any unlawful act or neglect of them, the said defendants, in respect to the said waters.

The defendants also say that the erection and operation of said morocco factory are lawful and useful, and are not *per se* nuisances; and that the apprehended injuries complained of in said bill are at most uncertain, indefinite, and contingent; and that it cannot now be definitely or certainly established or ascertained that the said factory or the operation thereof for the manufacture of morocco will cause any loss or injury to the complainant; and they deny that the complainant is entitled to any equitable relief whatever in the premises.

Soon after the filing of said answer, a motion was made for the dissolution of the preliminary injunction; and, upon the question as to whether affidavits should be read on motion to dissolve said injunction, the Chancellor decided, under Rule 64 of Equity Rules, that, the case being not of so pressing a nature that there was not time for the examination of witnesses, an examiner should be appointed to take the testimony of witnesses on both sides, for and against the motion to dissolve; but that if the defendants' counsel insisted that his motion to dissolve the injunction was of so great urgency as to preclude this, *ex parte* affidavits might be read; complainant's counsel offering affidavits already taken in support of the bill.

Afterwards one or more attachments for contempt for the violation of said preliminary injunction were granted, which by agreement of solicitors on both sides, the chancellor consenting, were discharged.

Finally, the preliminary injunction granted in this cause was, without opposition of defendants' counsel, and by consent, made perpetual.

Syllabus.—Statement.

THE JESSUP & MOORE PAPER COMPANY

vs.

PETER J. FORD, THOMAS FORD, and THOMAS F. RYAN.

New Castle, March T., 1887.

Pollution of natural stream; injunction.

1. A riparian owner on a natural stream has a legal right to the flow of the stream, in its accustomed channel and usual volume, and in its accustomed purity, unpolluted by riparian owners above.
2. The authority of a court of equity to restrain the pollution of natural streams, where such pollution will cause irreparable injury and loss to a riparian owner in his accustomed and necessary legal use of the waters thereof, is unquestionable.
3. Where the danger threatened is of such a nature that it cannot easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, an interlocutory injunction will be allowed, unless the equities of the bill are satisfactorily refuted.
4. A preliminary injunction granted—at the suit of a riparian owner operating paper-pulp works on a natural stream, the use of the water of which in an unpolluted condition was necessary to his business and to which he was entitled—to restrain the operation, by an upper riparian owner, of a morocco factory, the operation of which threatened to pollute the waters of the stream and render them unfit for use by others and so work serious injury to the complainant's business.

BILL FOR AN INJUNCTION.—The complainant, a corporation of the State of Delaware, is the owner of a tract of land containing about 64 acres, in Christiana Hundred in New Castle County, at the point where a certain ancient stream of water, called "Mill Creek," empties into the Christiana River, in said county.

The complainant erected on this land extensive and expensive buildings, machinery, and appliances for the

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manufacture of wood pulp, used in the manufacture of paper. A large volume of pure and unpolluted water is necessary to be supplied daily for the prosecution of such business.

The bill alleges that in view of the above requirement of the business, complainant selected and purchased the said land on account of its proximity to said Mill Creek and the convenience of obtaining the required water from the same in proper quantity and quality; that the water of said creek, from time immemorial, has been and is sufficiently pure and unpolluted for the complainant's use in its business; and that the complainant has continuously used the water of said creek in the prosecution of its said business, and that it is compelled to rely on the waters of said creek, not only for the proper prosecution of its business, but for the watering of its livestock.

The bill also states that about 10,400 feet above the manufacturing site of the complainant a certain ancient and perennial stream or run or watercourse, known as Chestnut Run or Silver Brook, empties into said Mill Creek; that the defendants are engaged in erecting a morocco factory in immediate proximity to said Silver Brook, about 6,000 feet above its confluence with Mill Creek, from which said proposed factory noxious and offensive matter, or refuse, and impure and foul water, used in connection with the manufacture of morocco, and containing decayed animal matter, blood, lime, tanic acid, mineral poisons, hair and excrement of animals, and the general refuse of a morocco factory, consisting of divers other foul, noxious, offensive, and polluted substances, will be discharged in large quantities, from day to day, into the said stream or run, if the said building be completed and used for the purposes for which it is intended, namely, the manufacturing of morocco. That

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such discharges into Silver Brook would necessarily also be discharged into Mill Creek, and render the waters thereof unfit for use in the manufacture of wood pulp, and will destroy the business of the complainant, in the conduct of which 150 men on the average are employed, and render worthless the buildings, machinery, and appliances of the complainant, which have cost, in their erection and construction, upwards of \$100,000.

The bill alleges that notice was given to the defendants to abstain from the pollution or spoiling of the waters of said brook and creek, and that complainant should insist on its right to the use of the same in quantity and quality as they then were, by all legal and equitable means; but that notwithstanding the service of said notice the defendants still continue the erection of the proposed factory, and persist in their intention to use it as such.

The bill prays that the defendants may be restrained by injunction from discharging or permitting to be discharged from said proposed factory, directly or indirectly into the waters of said stream or run, any noxious or offensive matter or refuse, or any impure or foul water used in connection with the manufacture of morocco, or containing decayed animal matter, blood, lime, mineral poison, excrement of animals, or any noxious or offensive refuse.

A rule was served upon the defendants to show cause, at the time and place therein stated, why a preliminary injunction should not be awarded as prayed for in the bill.

The hearing of the motion for a preliminary injunction was continued from time to time, until the answer of the defendants had been put in under oath. Similar questions were then raised and discussed by solicitors for the parties respectively, as to the admissibility of affida-

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vits in support of the bill and answer to those raised and discussed in the case of Forman against the same defendants, *ante*, p. 47; and the same decision of these questions was made by the Chancellor as in that case.

The answer in this case was in all material respects similar to that made by the same defendants in the case of Forman against them, with the additional statement that the said morocco factory is more than three miles above the pulp works of the complainant, and that the waters of said Silver Brook flowing that distance, and by mingling with the waters of Mill Creek, would become so purified as to render innoxious any matter which might be discharged into the waters of said Silver Brook.

Victor Dupont, Edward G. Bradford, and Willard Saulsbury, Jr., for the complainant:

The complainant as a riparian owner on Mill Creek possesses certain well-defined and legal rights in respect to said stream. It has a natural and legal right to the flow of said stream in its accustomed channel and in its usual volume through and along its land. *Carlisle v. Cooper*, 6 C. E. Green, 576; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335, 342; High, Inj. §§ 794–796.

It has a right to the use of the water of said stream from its source to its termination. Ang. Watercourses, § 4 *b*, and note 1; 2 Hill. Torts, ed. 1859, pp. 109, 120, 121.

It has a legal right to the flow of said stream in its accustomed purity, unpolluted by riparian owners above; and this right is as well established and clearly defined as the right to the flow of the water itself. Kerr, Inj. *382, § 10; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335, 343; *Attorney-General v. Steward*, 5 C. E. Green, 415–419; *Carhart v. Auburn Gas Light Co.* 22 Barb. 297; *Clowes v. Staffordshire Potteries Water-*

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works Co. L. R. 8 Ch. App. 125; *Attorney-General v. Steward*, 6 C. E. Green, 340; High, Inj. 798; *Silver Spring B. & D. Co. v. Wanskuck Co.* 13 R. I. 611.

And the size of the watercourse is immaterial; it may sometimes be dry. Ang. Watercourses, §§ 4, 4 A; *Shields v. Arndt*, 3 H. W. Green, 246, 247; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Earl v. De Hart*, 1 Beas. 280; *Gillett v. Johnson*, 30 Conn. 180; *Wheatley v. Baugh*, 25 Pa. 529-531; *Arnold v. Foot*, 12 Wend. 330.

To so pollute a stream as to render it useless to riparian owners below is practically to destroy the stream and to appropriate their rights. *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335; High, Inj. 798; *Silver Spring B. & D. Co. v. Wanskuck Co. supra*.

Riparian rights are property as much as the right to the soil itself, and to pollute the water of a running stream amounts to a divesting and appropriation of the vested rights of riparian owners lower down the stream; and this cannot be legally effected against the will of such owners, unless through the exercise of the right of eminent domain. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Gardner v. Newburgh*, 2 Johns. Ch. *162; *March v. Portsmouth & C. R. Co.* 19 N. H. 372-379; *Useful Manuf. Soc. v. Morris Canal & B. Co.* 1 Saxt. 157-187; *Hooker v. New Haven & N. Co.* 14 Conn. 146-162; *Burden v. Stein*, 27 Ala. 104; *Silver Spring B. & D. Co. v. Wanskuck Co. supra*; *Mills*, Em. Dom. § 190.

But the right of eminent domain cannot be invoked to aid the defendants in this case. They have shown no permit to tap said sewer, and if they had such permit they could not use it as a defense. City Ord. p. 403, § 5.

The city of Wilmington, having no power to take our property without compensation, can of course authorize no one else to take it.

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The pollution of a natural stream to the detriment of a riparian owner using the same for lawful purposes, constitutes a nuisance of which he has a right to complain in courts of justice. It gives him a right of action. *Howell v. M'Coy*, 3 Rawle, 256-268; *Carhart v. Auburn Gas Light Co.* 22 Barb. 297; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335, 342; *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401.

The delicate nature of the manufacture in which the water is used makes no difference. A riparian owner is entitled to the use of the water in its natural state. *Clowes v. Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. App. 125; *Carhart v. Auburn Gas Light Co.* 22 Barb. 297; *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 288; High, Inj. § 798; *Silver Spring B. & D. Co. v. Wanskuck Co.* 13 R. I. 611.

Such pollution is, to a riparian owner below, both an injury and damage. *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. D. 769; *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401.

It is immaterial whether the nuisance be public or private; if the complainant suffers special damage. Ang. Watercourses, § 137; *Frink v. Lawrence*, 20 Conn. 117.

That the trade or business creating the nuisance is lawful makes no difference. *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335; *Wahle v. Reinbach*, 76 Ill. 322; Kerr, Inj. *382, § 10 (e), *Carhart v. Auburn Gas Light Co.* 22 Barb. 297; *Robinson v. Baugh*, 31 Mich. 290; *Crossley v. Lightowler*; L. R. 3 Eq. Cas. 279, L. R. 2 Ch. App. 478; *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 160; *Attorney-General v. Steward*, 6 C. E. Green, 340, 5 C. E. Green, 415-417. And the fouling by many will not excuse the fouling by one. Kerr, Inj. *382, § 10 (d); *Crossley v. Lightowler*, L. R.

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3 Eq. Cas. 279, L. R. 2 Ch. App. 478; *Attorney-General v. Steward*, 5 C. E. Green, 419; *Robinson v. Baugh*, 31 Mich. 290.

It is immaterial by whom the nuisance is created, whether by individuals or by municipal corporations. *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Hughes v. Modern College*, 1 Ves. Sr. 188; High, Inj. § 810; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739; *Goldschmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Ch. App. 349; *Attorney-General v. Birmingham T. & R. D. Board*, L. R. 17 Ch. D. 685.

The growing density of population, the making of public improvements, or the establishment of great trading concerns, will not justify the creation or continuance of such a nuisance. *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335; *Gardner v. Newburgh*, 3 Johns. Ch. 162; Wood, Nuis. Bradf. ed. § 434; Story, Eq. Jur. § 925 (a), note 5.

A private party may have relief in equity where the injury results from public nuisance. *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 563-567, 14 L. ed. 249; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 98, 9 L. ed. 1012; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Sampson v. Smith*, 8 Sim. 272; *Spencer v. London & B. R. Co.* 8 Sim. 193; 2 Story, Eq. Jur. § 924 (a); *Soltau v. DeHeld*, 9 Eng. L. & Eq. 104; *Attorney-General v. Forbes*, 2 Mylne & C. 123-130; Kerr, Inj. *334, § 4, note 1.

He is also entitled to equitable relief against a private nuisance. 2 Story, Eq. Jur. §§ 925-928; *Catlin v. Valentine*, 9 Paige, 575; *Mohawk & H. R. R. Co. v. Archer*, 6 Paige, 83; *Belknap v. Belknap*, 2 Johns. Ch. 463; Ang. Watercourses, § 444; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739;

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Crossley v. Lightowler, L. R. 3 Eq. Cas. 279, L. R. 2 Ch. App. Cas. 478.

A court of equity will, by the summary remedy of injunction, prevent or stop such pollution. The foundation for the exercise of its jurisdiction is that the injury will be irreparable, or the remedy at law would be insufficient or productive only of interminable and vexatious litigation. *Carlisle v. Cooper*, 6 C. E. Green, 576, 589; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335-342; *Shimer v. Morris C. & B. Co.* 11 C. E. Green, 364; *Shields v. Arndt*, 3 H. W. Green, 234; *Arthur v. Case*, 1 Paige, 447; *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Crossley v. Lightowler*, *supra*; *Clowes v. Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. App. Cas. 143; *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. Cas. 147; *Burden v. Stein*, 27 Ala. 194; *Lockwood Co. v. Lawrence*, 77 Me. 297; *Silver Spring B. & D. Co. v. Wanskuck Co.* 13 R. I. 611.

There is no means of estimating the damage to a riparian owner by polluting a stream. He may hereafter desire to put it to some other use which the pollution would prevent. *Pennington v. Brinsop Hall Coal Co.* L. R. 5 Ch. D. 769.

Such continued pollution might ripen into a right. Therefore a party may protect his right by injunction though there be no actual damage. *Webb v. Portland Mfg. Co.* 3 Sumn. 189; *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 277, L. R. 2 Ch. App. 478.

The injury threatened is irreparable, in the proper sense of that term. *Wood, Nuis.* § 778; *Wahle v. Reinbach*, 76 Ill. 322; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335, 343; *Fulton v. Greacen*, 36 N. J. Eq. 216; *Lockwood Co. v. Lawrence*, 77 Me. 207.

Courts of equity will proceed with the cause in the first instance, especially where the complainant's rights are

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clear, and will not compel him to first establish his rights at law. *Attorney-General v. Steward*, 5 C. E. Green, 415, 6 C. E. Green, 340; *Carlisle v. Cooper*, 6 C. E. Green, 576; *Babcock v. New Jersey Stock Yard Co.* 5 C. E. Green, 296; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335; *Shimer v. Morris C. & B. Co.* 27 N. J. Eq. 364; *Arthur v. Case*, 1 Paige, 447; *Olmsted v. Loomis*, 9 N. Y. 423, favorably overruling same case below, 6 Barb. 154, and also *Fisk v. Wilber*, 7 Barb. 395; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Hughes v. Modern College*, 1 Ves. Sr. 188; *Goldschmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Ch. App. 349; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Bush v. Western*, Finch, Prec. 530; *Attorney-General v. Doughty*, 2 Ves. Sr. 453; *Whalley v. Whalley*, 3 Bligh, 16; *Tatem v. Gilpin*, 1 Del. Ch. 13; *Catlin v. Valentine*, 9 Paige, 575; *Burden v. Stein*, 27 Ala. 104.

The mere denial of complainant's right, by the answer, will not oust the court of its jurisdiction, especially where the complainant has long used his rights; and where the complainant claims the protection of the court for the enjoyment of a natural watercourse, his rights will usually be regarded as clear. *Carlisle v. Cooper*, 6 C. E. Green, 576-580; *Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335, 343, 344; *Shields v. Arndt*, 4 N. J. Eq. 234.

But in this case the right of complainant as a riparian owner is admitted by the answer. The only question to be considered in this case is, What will be the result of the act complained of and threatened? It is only for the court to be satisfied, from the facts, of the propriety of granting the injunction. *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 568, 14 L. ed. 249; *Mohawk & H. R. R. Co. v. Archer*, 6 Paige, 83; *Earl v. De Hart*, 12 N. J. Eq. 280; *Wahle v. Reinbach*, 76 Ill. 22; *Miller v. Wack*, 1 Saxt. 204.

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A preliminary or interlocutory injunction will be granted upon less positive proof than would be required at the final hearing to obtain a perpetual injunction. *United States v. Duluth*, 1 Dill. 469; High, Inj. §§ 4, 5; *Ross v. Butler*, 19 N. J. Eq. 307; *Kersey v. Rash*, 3 Del. Ch. 321, 326.

The power of awarding an issue should be sparingly exercised by courts of equity, and is entirely discretionary. *Carlisle v. Cooper*, 6 C. E. Green, 576-589; *Dale v. Roosevelt*, 6 Johns. Ch. 255; *LeGuen v. Gouverneur*, 1 Johns. Cas. 436, 500, 506, 507, 520.

Courts of equity will, by injunction, prevent the commission of threatened injury and nuisances, and will not wait until the wrong is actually done. *Catlin v. Valentine*, 9 Paige, 575; *Wahle v. Reinbach*, 76 Ill. 322; 3 Pom. Eq. Jur. §§ 1350, 1351; *Ross v. Butler*, 19 N. J. Eq. 294; *Attorney-General v. Steward*, 5 C. E. Green, 415, 6 C. E. Green, 340; *St. Louis v. Knapp Co.* 104 U. S. 658, 26 L. ed. 833; *Coker v. Birge*, 9 Ga. 425; *Lyon v. McLaughlin*, 32 Vt. 423; *Crisman v. Heiderer*, 5 Colo. 589, 594; *Cleveland v. Citizens Gas Light Co.* 5 C. E. Green, 201; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Arthur v. Case*, 1 Paige, 447; *Kates v. Jack*, L. R. 1 Ch. App. Cas. 295; Kerr, Inj. 339, 340, § 13, notes; *Attorney-General v. Doughty*, 2 Ves. Sr. 453; *Useful Manuf. Soc. v. Morris C. & B. Co.* 1 Saxt. 192; *Shields v. Arndt*, 4 N. J. Eq. 245; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Frink v. Lawrence*, 20 Conn. 117; *Fulton v. Greacen*, 9 Stew. 216.

It lies wholly in the discretion of the court whether to grant or refuse or dissolve a preliminary injunction; and an injunction will not be dissolved as of course upon the coming in of the answer. Kerr, Inj. *634, § 4, note R; *Kersey v. Rash*, 3 Del. Ch. 321, 326; *Poor v. Carleton*, 3 Sumn. 70; Wood, Nuis. § 817; *Roberts v. Anderson*, 2

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Johns. Ch. 202; *Purnell v. Daniel*, 8 Ired. Eq. 9; *Firmstone v. DeCamp*, 17 N. J. Eq. 309-316; *Irick v. Black*, Id. 189, 200; *Fleischman v. Young*, 9 N. J. Eq. 620; *Stotesbury v. Vail*, 13 N. J. Eq. 390, 394; *Blossom v. Van Amringe*, Phill. Eq. 133; *Parker v. Grammer*, Id. 28; *McBrayer v. Hardin*, 7 Ired. Eq. 1; *Johnson v. Allen*, 35 Ga. 252; *Edwards v. Banksmith*, Id. 213; *White v. Nunan*, 60 Cal. 406.

The long distance between complainant's and defendants' works is immaterial, if the complainant suffer injury. *Wood*, Nuis. § 436; *Story*, Eq. Jur. § 925 A, note 5; *Attorney-General v. Birmingham*, 4 Kay & J. 528; *Stockport Waterworks Co. v. Potter*, 7 Hurlst. & N. 160; *Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401.

The completion of defendants' factory, since notice to refrain, cannot avail defendants. *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 563, 578, 14 L. ed. 270.

In this case complainant can, on strong grounds, claim the protective power of this court. Notice was given defendants to refrain (*Holsman v. Boiling Spring Bleaching Co.* 1 McCart. 335, 348); and objection made to the erection of the works. *High*, Inj. § 797.

The alleged intention of defendants, by appliances or devices, to prevent the threatened nuisance, is no answer to the application for an injunction, in that the nature or kind of appliances or devices has not been set out; and the court is thus deprived of all means of forming an intelligent judgment upon this subject. Such statement is therefore entitled to no weight. *Wood*, Nuis. 823.

Preventive remedies taken by the defendants since filing of the bill will not avail to hinder the decreeing of perfect relief. *Carlisle v. Cooper*, 6 C. E. Green, 576, 592.

The financial responsibility of defendants can have

Argument for defendants.

nothing to do with the case. The threatened injuries cannot be adequately compensated in damages. Should there be a doubt in the chancellor's mind, an injunction in such a case should be continued if already granted, or, by parity of reasoning, granted upon application. *Purnell v. Daniel*, 8 Ired. Eq. 9.

Especially is this true in this State, where injunction bonds are required, and any expense incurred by defendants is thereby secured to them. *Kersey v. Rash*, 3 Del. Ch. 321-326.

Where an injunction, if granted, can do no harm to the defendants, and may prevent irreparable injury to the complainant, the court will grant or continue a preliminary injunction. *McBrayer v. Hardin*, 7 Ired. Eq. 1.

William C. Spruance, with *George Gray*, for the defendants:

We find no reported case in Delaware in which a nuisance, public or private, has been restrained by injunction.

The case of *Tatem v. Gilpin*, 1 Del. Ch. 13, was a case amounting to waste, by damming and setting back water, and not a mere nuisance.

The writ was refused in the following cases, in which the chancellor laid down rigid rules in cases of nuisance: *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435; *Gray v. Baynard*, 5 Del. Ch. 499. See also *Philadelphia's Appeal*, 78 Pa. 33; 2 Story, Eq. § 959 (b), note 1.

If the fact of nuisance be doubtful, an information will not be granted until the nuisance be established at law. 2 Story, Eq. §§ 923, 924 (a).

A court of chancery will not interfere to prevent a private nuisance, unless it has been erected to the annoyance of the right of another long previously enjoyed

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It must be a case of strong and imperious necessity, or the right previously established at law, before a party is entitled to injunction. *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282, 283, 287, 288.

An injunction to restrain defendants from discharging foul, noxious, or impure matter into a stream is refused, even when the plaintiff had established his right at law by the recovery of nominal damages, in a case where the fouling of the water was not so serious and continuous as to seriously obstruct the plaintiff's manufacture—where damages would compensate—where the injunction would seriously injure the defendants. *Wood v. Sutcliffe*, 2 Sim. N. S. 163.

It is not every case, even of a clear violation of the plaintiff's right, that entitles him to an injunction. It is not every case in which there is a right of action for a nuisance that will justify the interposition of courts of equity. The injury must be such as from its nature is not susceptible of being adequately compensated by damages at law, etc.

A mere diminution of the value of property by the nuisance, without irreparable mischief, will not be any foundation for equitable relief. 2 Story, Eq. Jur. § 925; *Bruce v. Delaware & H. Canal Co.* 19 Barb. 371-379; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Fort v. Groves*, 29 Md. 188, 192-194.

Irreparable injury is such injury as is likely to be so great as to be incapable of compensation in damages. *Rhodes v. Dunbar*, 57 Pa. 286.

Where damages will compensate, an injunction will not be granted. *Richard's Appeal*, 57 Pa. 105, 110-114.

The injury to warrant an injunction must be substantial and material, and not slight, and without serious damage. *Rhodes v. Dunbar*, 57 Pa. 287.

The statement in the bill that irreparable injury will

Argument for defendants.

be done is to be regarded only as the expression of the plaintiff's view; but the court is not precluded from looking into the facts alleged, for the purpose of determining whether this is true. *Coe v. Winnepisiogee Lake, C. & W. Mfg. Co.* 37 N. H. 254, 263, 264; *Amelung v. Seekamp*, 9 Gill & J. 468; *Fort v. Groves*, 29 Md. 193.

A preliminary injunction will be dissolved if it appears to the court that its dissolution will not lead to irreparable injury, or cause loss to the plaintiff, which cannot be repaired in damages. *Wing v. Fairhaven*, 8 Cush. 363, 364.

Regard should be had to the consequences to the defendants if the injunction should be granted, as well as the consequences to the plaintiff if it is denied. *Bruce v. Delaware & H. Canal Co.* 19 Barb. 379; *Wing v. Fairhaven*, 8 Cush. 363, and also the Illinois and Pennsylvania cases cited on the other points.

The erection and operation of said morocco factory are not *per se* nuisances. It is a lawful and useful enterprise, and should be encouraged, and not hindered. The apprehended injuries complained of, even if possible under some circumstances, are not the necessary and inevitable result of its operation. From the nature of the case it cannot now, by any amount of testimony, be proved that its operation will result in the injury complained of.

Even if the operation of the factory would necessarily result in the discharge into Silver Brook of the fluids or substances mentioned in the bill, it may be that the quantity would be so small as not to result in serious or material injury to the waters of Mill Creek at the point where the same is used by the complainant.

If the thing sought to be prohibited is not unavoidably and in itself noxious and injurious,—that is *per se* a nuisance,—but only something which may according to

Argument for defendants.

circumstances prove to be so, the court will refuse to interfere by injunction until the matter has been tried at law by an action. High, Inj. § 488; *Ripon v. Hobart*, 3 Myl. & K. 169, Coop. Sel. Cas. 343, *Lord Brougham; Kirkman v. Handy*, 11 Humph. 406; *Simpson v. Justice*, 8 Ired. Eq. 115; *Laughlin v. Lamasco City*, 6 Ind. 221, 227-229; *Thebaut v. Canova*, 11 Fla. 143; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554, 555, 563-565; *Dunning v. Aurora*, 40 Ill. 481, 485-487; *Lake View v. Letz*, 44 Ill. 81-85; *Butler v. Rogers*, 9 N. J. Eq. 487-489; *Rhodes v. Dunbar*, 57 Pa. 274-291; Wood, Nuis. § 789; Kerr, Inj. p. 340, § 13; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Haines v. Taylor*, 2 Phill. 209; *Bruce v. Delaware & H. Canal Co.* 19 Barb. 371.

Where an injunction is asked to restrain the construction and operation of works of such a nature that it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused and the motion for injunction will be discharged, and not allowed to stand over until the works are so in operation that their character may be determined. High, Inj. § 489; *Haines v. Taylor*, 2 Phill. 209.

Where water is fouled by many persons besides the defendant, it is incumbent on the complainant to distinguish between the injury produced by the defendant and that produced by others; and it is also incumbent on him to show that the irreparable injury complained of has been, or will inevitably be, produced by the defendant.

One who selects as his place of residence or business a large city, or the suburbs of a large city,—as in this case,—“tacitly undertakes to suffer such annoyances or inconveniences as are incidental to that kind of community.” *Rhodes v. Dunbar*, 57 Pa. 287, 288; *Richard's Appeal*, Id. 105.

Argument for defendants.—Opinion.

There must be no misrepresentation or concealment of important facts ; and if the plaintiff keeps in the background material facts which are important to enable the court to form its judgment, such conduct is of itself sufficient to prevent the interposition of the court. 1 High, Inj. p. 10, § 11.

In the only two cases cited by the complainant in which the distance was great between the point of discharge and the point of injury,—7 Hurlst. & N. 160, and 2 Story, Eq. Jur. note (a),—the fact of the discharge and the fact of corruption were proved. In neither of these cases was there any occasion for speculation as to the possible result; the result was proved as a fact.

No case can be found in which, when the distance was as great as in this case and the discharge was of similar amount and kind, an injunction was granted until the fact of injury to the complainant was proved or admitted.

As to *United States v. Duluth*, 1 Dill. 469, it appears that the works of the defendant had been partially erected in a navigable river, but sufficient time had not elapsed to enable the court to determine as to the effects they would produce, the opinion of the witnesses as to the probable result being conflicting, preliminary injunction was granted ; but as the works had been partially erected, and would so remain, their effect could be ascertained at a final hearing.

But in the present case, if all discharges into Silver Brook be prohibited by preliminary injunction, at a final hearing the court will have no additional facts on which to determine the effect on the water of Mill Creek, and at the first hearing the court would have to decide on speculation.

THE CHANCELLOR.—It appears from the affidavits filed in the cause that the defendants have erected, and since

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the filing of this bill have begun to operate, an extensive morocco manufactory at Second and Webb streets, in the city of Wilmington, on the banks of a small stream called Silver Brook, which from that point flows a distance of about 6100 feet until it empties into Mill Creek. Mill Creek, from the point where Silver Brook empties into it, flows a distance of about 10,400 feet, until it empties into the Christiana River, at said mills of the complainant.

The complainant contends that the discoloration of the waters of Mill Creek, and also the dye stuffs and impure substances contained in the refuse matter discharged from said factory, will render the water of said Mill Creek totally unfit for use in the complainant's pulp works; that the lime and lime-water would kill the "bleach," a part of the process in manufacturing wood pulp, by neutralizing the chlorine; and that loose hair passing down said stream would mingle with the paper pulp and paper, and render it unsalable; and that the necessary result of the operation of the morocco factory by the defendants, and the discharge into said stream of the said refuse matter, will be the stoppage of the said pulp works, thus depriving the other mills of the complainant of their supply, from the said pulp works, of the material necessary for the manufacture of paper, causing it loss of trade and great and irreparable damage.

I have given careful attention to the contents of the affidavits filed in support both of the bill and answer; and while giving due credit to all the witnesses, both of the complainant and the defendants, the best judgment which I am able to form in respect to their statements is that the discharge of the refuse matter from said morocco factory in the said Silver Brook, the waters of which would necessarily flow into and mingle with the waters of Mill Creek, would be perilous to the business

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of the complainant, as set forth and described in its bill of complaint. Since the defendants have commenced operating their factory, they seem to have run the refuse and polluted waters into ponds dammed off near their factory and adjoining Silver Brook.

These ponds have several times broken the dams, and the contents thereof have been discharged into Silver Brook, the water of which has been blackened and discolored all the way from said factory to Mill Creek, and also the waters of Mill Creek have been blackened and polluted for a considerable distance below said factory. The small fish in said Silver Brook have been killed by the pollution of the waters thereof; the water has been made unfit for the use of cattle for days after such discharge; the bottom of the stream has been blackened by sediment, and black scum in some places has covered the water; this discoloration of the water extended a considerable way into Mill Creek.

The superintendent and assistant superintendent of the pulp works swear that the waters at Mill Creek have not been so pure as usual, and larger quantities of bleaching matter have had to be used to counteract the effect of the pollution caused by a few discharges of this morocco refuse; they say that they cannot account for this change in the water in any other way.

Without attempting a reference to all the statements contained in the affidavits in support of the bill and answer,—for a great many affidavits have been put in,—it is sufficient to say that, in my judgment, it is reasonable to believe that the continued discharges of the refuse matter from said factory into Silver Brook, and thence into Mill Creek, will work serious injury and damage to the business of the complainant, and all others who are compelled to rely on the waters of Silver Brook and Mill Creek for a proper supply of pure and unpolluted waters.

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The damage to the owners and proprietors of land on Silver Brook sufficiently appears by the affidavits read on the hearing of this rule; and in addition to the testimony of numbers as to the consequences of the pollution of the waters of Mill Creek to the business operations of the complainant at its mills is the positive testimony of the superintendent and assistant superintendent before referred to.

This case appears to be one which calls for the interposition of this court by way of preliminary injunction.

Where a complainant shows a reasonable and well-founded apprehension of immediate threatened and irreparable injury and loss, it is a duty of courts of equity, in cases within their jurisdiction, to restrain the commission of such injury and infliction of such loss.

I shall not attempt to discuss all the questions raised by the respective parties to this cause in the arguments of their respective solicitors, nor shall I notice in detail in this opinion the many authorities cited in their arguments, which arguments were learned and elaborate. I have, however, carefully considered these authorities and weighed the arguments of the solicitors. I shall content myself, however, with stating a few propositions well established by authority, and which admit of no reasonable doubt.

The complainant has a legal right to the flow of water of said Mill Creek in its accustomed channel and in its usual volume. It has a legal right to the flow of said stream in its accustomed purity, unpolluted by riparian owners above.

To so pollute a stream as to render it useless to riparian owners below is practically, as to them, to destroy the stream, and to destroy their rights therein, as riparian owners.

The authority of a court of equity to restrain the pol-

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lution of natural streams of water, where such pollution will cause irreparable injury and loss to a riparian owner in his accustomed and necessary legal use of the waters thereof, is unquestionable and established by numerous authorities, some of which have been cited in arguments in this cause.

Where the danger threatened is of such a nature that it cannot easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, an interlocutory injunction will be allowed, unless the equities of the bill are satisfactorily refuted by the defendant. *United States v. Duluth*, 1 Dill. 469.

It seems in that case that numerous affidavits of engineers and others were offered on both sides as to the effect of the work sought to be enjoined; the opinions expressed being quite conflicting. The court, Miller, J., said: "The affidavits on both sides are numerous. They demonstrate what all courts and juries have so often felt, that where the question is one of opinion, and not of fact, though that opinion should be founded on scientific principles or professional skill, the inquiry is painfully unsatisfactory, and the answers strangely contradictory. In this emergency I am relieved by a principle which has generally governed me, and which, I believe, governs nearly all judges in applications for preliminary injunctions. It is that when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, the temporary injunction should be granted, unless the case made by the bill is satisfactorily refuted."

A preliminary injunction is awarded, as prayed in the bill.

Syllabus.—Statement.

HENRY STOCKBRIDGE, Receiver of THE DUFFY MALT
WHISKEY COMPANY OF BALTIMORE CITY,

v8.

SAMUEL C. BECKWITH, THE EVERY EVENING PRINTING
COMPANY, THE MORNING NEWS PUBLISHING COM-
PANY, and NATHAN B. DANFORTH.

New Castle, Sept. T. 1887.

*Insolvent foreign corporation; receiver appointed in
another State; rights of in this State.*

A receiver appointed by the Circuit Court of the City of Baltimore, in the State of Maryland, is not entitled to an injunction of the court of chancery of this State, to restrain the collection of a judgment recovered at law in this State by creditors of an insolvent corporation, nor against persons who have recovered judgments against the garnishees of such insolvent corporation under process of foreign attachment.

BILL FOR AN INJUNCTION.

THE CHANCELLOR:—The Duffy Malt Whiskey Company of Baltimore City is a corporation created under the laws of the State of Maryland. At a session of the Circuit Court of Baltimore City, held on the 12th day of November, 1886, Henry Stockbridge, the complainant in this cause, was appointed receiver of said corporation, with power and authority to take charge and possession of the goods, wares, and merchandise, books, papers, and effects of or belonging to the said corporation, and to collect the outstanding debts due to it. Nathan B. Danforth, of the city of Wilmington, in this State, was at the time of the appointment of Henry Stockbridge receiver of said corporation, and at the time of the filing of the bill in this cause indebted to said corporation in the sum of \$400. The corporation then was and is now insolvent.

Statement.

On the 18th day of November, 1886, one Samuel C. Beckwith, a resident of the city of New York and State of New York, caused to be issued, out of the Superior Court of the State of Delaware, in and for New Castle County, a writ of foreign attachment, being No. 128 as of the November Term, 1886, and under and pursuant to said writ the said sum of \$400 was attached in the hands of said Nathan B. Danforth; and the said Danforth was summoned, as garnishee, to appear at the said court to declare what money or effects of the said Duffy Malt Whiskey Company he had in his hands at the time said attachment was made.

On the 11th day of February, 1887, at the February Term of said Superior Court, judgment was given for said Samuel C. Beckwith, plaintiff in said attachment, against said Nathan B. Danforth, garnishee of the said corporation, for the sum of \$400, besides costs.

The Every Evening Printing Company, a corporation of the State of Delaware, on the 22d day of November, 1886, before Levi A. Bartolett, a justice of the peace of the State of Delaware in and for New Castle County, caused a writ of foreign attachment to be issued against the said Duffy Malt Whiskey Company of Baltimore City, whereby the said Nathan B. Danforth was summoned, as garnishee of said company, to answer what goods, chattels, rights, or effects were in his hands on the 17th day of December, 1886, before said justice of the peace, and thereupon judgment was rendered in favor of the said Every Evening Printing Company, the plaintiff in said attachment, against the said Nathan B. Danforth, garnishee of the said Duffy Malt Whiskey Company of Baltimore City, for the sum of twenty-eight dollars and thirteen cents, besides six dollars and sixty-five cents costs.

The Morning News Publishing Company, a corpora-

Statement.

tion of the State of Delaware, on the 22d day of November, A. D. 1886, before the said Levi A. Bartolett, justice of the peace aforesaid, caused a writ of foreign attachment to be issued against the said Duffy Malt Whiskey Company of Baltimore city, whereby the said Nathan B. Danforth was summoned, as garnishee of said company, to answer what goods, chattels, rights, or effects of the said corporation might be in his hands; and on the seventh day of December, 1886, judgment was rendered by the said justice of the peace, in favor of the said Morning News Publishing Company, plaintiff in said attachment, against the said Nathan B. Danforth, garnishee of said corporation, for the sum of seventeen dollars and seventy-four cents, besides six dollars and sixty-five cents costs.

The complainant prays that the said Samuel C. Beckwith, the Every Evening Printing Company, and the Morning News Publishing Company may be restrained, by the order and injunction of this court, from levying any execution which they have obtained in said several actions, upon the credits in the hands of the said Nathan B. Danforth; and that they may be ordered and decreed to relinquish and abandon said attachments; and that Nathan B. Danforth may be decreed to pay the complainant, the said receiver, the said sum of four hundred dollars, for the benefit of the creditors of the said insolvent, the Duffy Malt Whiskey Company of Baltimore City.

Upon filing the bill a rule was laid upon the defendants therein to appear before the chancellor at his chambers, in Dover, and show cause why a preliminary injunction should not be awarded according to the prayer of the bill. The rule has been continued from time to time until the present term, upon application of the parties.

Arguments.

Benjamin Nields, in support of the rule, cited *Hurd v. Elizabeth*, 41 N. J. L. 1; *Hoyt v. Thompson*, 5 N. Y. 320; *Runk v. St. John*, 29 Barb. 585.

H. H. Ward, against the rule, cited, as to the nature, rights, and powers of a receiver: *High, Receivers*, §§ 175, 201, 204, 205, 208, 209, 220; *Re Colvin*, 3 Md. Ch. 278, 302; *Ellicott v. United States Ins. Co.* 7 Gill, 307, 320; *Williamson v. Wilson*, 1 Bland, Ch. 431.

He contended:

1. The receiver must show his authority to sue and leave of court.

2. The Duffy Malt Whiskey Company would be bound by our attachment laws, and so its representative, the receiver, is also bound by them.

3. The action should have been brought in the name of the Duffy Malt Whiskey Company, and the receiver cannot maintain an action in his own name as receiver.

4. A receiver cannot maintain an action, in his capacity as receiver, in the court of another State than the one in which he is appointed. *High, Receivers*, §§ 239-241, 471; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Brigham v. Luddington*, 12 Blatchf. 237; *Harvey v. Varney*, 104 Mass. 436, 443; *Farmers & M. Ins. Co. v. Needles*, 52 Mo. 17; *High, Receivers*, *158, § 240, note; *Upton v. Hubbard*, 28 Conn. 274, 283; *Byrne v. Walker*, 7 Serg. & R. 483, 486; *Graydon v. Church*, 7 Mich. 36, 49; *Hope Mut. L. Ins. Co. v. Taylor*, 2 Robt. 278; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Willits v. Waite*, 25 N. Y. 577.

5. When a creditor from another State subjects himself to the jurisdiction of the court of this State, by suing therein, he has all the rights of a citizen therein; and in a question of comity, merely, between the State of Maryland and the State of Delaware, his rights must prevail over that comity. U. S. Const. art. 4, § 2; *Paul v.*

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Virginia, 75 U. S. 8 Wall. 168, 180, 19 L. ed. 357; *Wallace v. Patterson*, 2 Harr. & M'H. 463, 464; *Hoyt v. Thompson*, 5 N. Y. 351; *Kidder v. Tufts*, 48 N. H. 121, 125; *Mulliken v. Aughinbaugh*, 1 Pen. & W. 117, 121; *Bartlett v. Wilbur*, 53 Md. 485.

6. A judicial assignment or an assignment by operation of law or in insolvency, in the State of Maryland, cannot so transfer the title of personalty situate in Delaware as to prevent a suitor in the courts of this State from maintaining his priority thereto by foreign attachment. It makes no difference whether the attachment is prior or subsequent to such judicial assignment, or whether the attaching creditor is a citizen of Delaware or not. 2 Kent, Com. 405-408; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 302, 3 L. ed. 104; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 332, 358, 6 L. ed. 647; *Crapo v. Kelly*, 83 U. S. 16 Wall. 610, 621, 622, 21 L. ed. 430; *Abraham v. Plestoro*, 3 Wend. 538; *Johnson v. Hunt*, 23 Wend. 87; *Milne v. Moreton*, 6 Binn. 353; *Holmes v. Remsen*, 20 Johns. 229, 254; *Blake v. Williams*, 6 Pick. 286, 302; *Taylor v. Columbian Ins. Co.* 14 Allen, 353; *Hoyt v. Thompson*, 5 N. Y. 320, 348; *Taylor v. Geary*, 1 Kirby, 313; *Byrne v. Walker*, 7 Serg. & R. 483; *Skiff v. Solace*, 23 Vt. 279; *Johnson v. Parker*, 4 Bush, 149; *Felch v. Bugbee*, 48 Me. 9; *Worden v. Nourse*, 36 Vt. 756.

7. The policy of the State of Maryland will not allow a judicial assignment, or an assignment by operation of law or in insolvency in another state, to pass the title to personalty in that state, or to interfere with the rights of creditors suing in that state. As comity of the State of Maryland would not be extended to the State of Delaware in this respect, no reason arises for the State of Delaware to extend its comity to the State of Maryland

Argument against the rule.

in this case. *Burk v. McClain*, 1 Harr. & M'H. 236; *Wallace v. Patterson*, 2 Harr. & M'H. 463.

As to the cases cited for the receiver :

Hurd v. Elizabeth, 41 N. J. L. 12. (1) The receiver had there, by virtue of the terms of his appointment, authority as far as any court can give it to collect debts wheresoever situate. (2) It states that a receiver should not be allowed to sue in a foreign jurisdiction in any case where there is a controversy between him and creditors. (3) The only point for the decision of the court upon the facts of the case was that a receiver could not sue when his interests clashed with those of a citizen of New Jersey ; this the court does decide.

The case is therefore no authority in this case, where the receiver of Maryland is attempting to interfere with the rights of Beckwith, the New York creditor. The whole scope of the case is shown by the illustration of the court on page 4, and is, as far as it goes, authority for the position of the respondents in this bill ; namely, that where the rights of any creditor not a citizen of Maryland clashes with the pretensions of the receiver of Maryland, the receiver cannot maintain his action in a foreign jurisdiction.

Chandler v. Siddle, 3 Dill. 477, the court here also puts, as a condition for its dictum, that the receiver should be duly authorized to maintain the suit in a foreign jurisdiction, and even then states its dictum doubtfully, recognizes the authority of *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164, and refuses to give a definite opinion concerning the powers of the receiver in respect to suits brought in that district.

Runk v. St. John, 29 Barb. 587, expressly states that all that has been settled by the decisions to which we have been referred on this subject is that our courts will not sustain the lien of foreign assignees or receivers, in

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Argument against the rule.—Opinion.

opposition to a lien created by attachment under our own laws. Even under this statement the receiver of Maryland could not maintain his action.

The case of *Booth v. Clark*, 58 U. S. 17 How. 324, 15 L. ed. 164, was not brought to the attention of the court, so that the case cannot be considered as questioning the binding authority of that case.

THE CHANCELLOR.—This case must be governed by that of *Booth v. Clark*, 58 U. S. 17 How. 324, 15 L. ed. 164, and the reasoning of Wayne, *J.*, who delivered the opinion in that case.

A receiver is an officer of the court appointing him. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is *in custodia legis* for whoever can make out a title to it. It is the court itself which has the care of the property in dispute.

The receiver is but the creature of the court. He has no powers except such as are conferred upon him by the order of his appointment, and the cause and practice of the court. A receiver's right to the possession of the debtor's property is limited to the jurisdiction of his appointment; and he has no lien upon the property of the debtor except for that which he may get the possession of without suit, or for that which, after having been permitted to sue for, he may reduce into possession in that way.

A receiver has no extraterritorial power of official action; none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where

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his debtor may be amenable to the tribunal which the creditor may seek.

Mr. Justice Wayne, in *Booth v. Clark*, says: "Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue, in a foreign jurisdiction, for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal. Orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last."

This was said in 1854. The case of *Hurd v. Elizabeth*, 41 N. J. L. 1, decided in 1879, held that a receiver appointed in a foreign jurisdiction, clothed with authority to take the designated property wherever situate, may sustain a suit for such property, in the courts of New Jersey; and that this was the rule whenever the creditors of the person represented by the receiver do not intervene. But this case is not at all inconsistent with the view I take of the case before me. It recognizes the case of *Booth v. Clark* as rightly decided.

In speaking of that case the learned chief justice of New Jersey said: "But that case belongs to a train of decisions which have been, undoubtedly, rightly decided, but which are not to be regarded as ruling the precise point now in issue. The decisions thus referred to will be found in *High on Receivers*, § 239; and they are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as

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against the claims of creditors resident here, to remove from this state the assets of the debtor, is a proposition that appears to be asserted by all the decisions."

In the case before me creditors of the corporation represented by the receiver have intervened,—two of these creditors are corporations in this State. The other is resident in the State of New York; but he has obtained a judgment in this State against the insolvent corporation of Maryland, and a judgment against a garnishee of that corporation, and is proceeding to collect the latter judgment. There is no principle of law or equity that forbids his doing so.

And the rule in this case is therefore discharged.

Syllabus.

ELIZA S. WALKER, Administratrix of WILLIAM WALKER,
Deceased,

vs.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE FARM-
ERS' BANK OF THE STATE OF DELAWARE.

Kent, May T., 1887.

*Mortgages; transfer of equity of redemption by mort-
gagor to mortgagee; conveyances for security.*

1. Where a mortgagor executes to the mortgagee a deed of the mortgaged premises, absolute on its face, the court will view with distrust and scrutinize with closeness the negotiation that led to the making of such deed, whereby it is claimed by the mortgagee that the right of redemption was extinguished and the previous mortgage converted into an absolute sale.
2. In equity, a conveyance, whatever form it may assume, will be treated as a mortgage whenever it appears to have been taken as a security for an existing debt or a contemporaneous loan, and the inclination of the court is, in doubtful cases, so to treat it and allow the grantor to redeem.
3. It is not essential to the validity of a purchase of the equity of redemption by the mortgagee, that he be able afterwards to show that he paid for the property all that any one would have been willing to give.
4. The use of the prescribed form of legal process for enforcing a mortgage upon land is not such an exercise of power by the mortgagee over the mortgagor as a mortgagee in possession is forbidden to use to obtain a conveyance of the realty from the mortgagor.
5. Default having occurred on a real-estate mortgage, judgment was recovered on *scire facias* upon the mortgage, and subsequently *levari facias* was issued on the judgment. Thereupon (the mortgagee not being in possession) negotiations took place between the parties, which resulted in the withdrawal of the *levari facias* by the mortgagee, and the execution of a deed of the mortgaged premises, by the mortgagor to the mortgagee, in satisfaction of

Syllabus.—Statement.—Argument for complainant.

the indebtedness. Thereafter the mortgagee,—grantee in said deed—sold the property for more than enough to satisfy the indebtedness, and the mortgagor thereupon filed a bill against the mortgagee, alleging that the deed was procured by deception and fraud, and that it was intended as a mortgage, and praying that the surplus of the amount received by the defendant from the sale of the premises, over the indebtedness, be paid over to complainant. *Held*, on the facts, that there was no unfairness manifest in procuring the deed; that the mortgagor was not compelled in any manner to sell to the mortgagee otherwise than from the want of a better purchaser; that he did not sell to the mortgagee for less than others would have given; that the consideration for the conveyance was not inadequate, nor was it coupled with unfairness or oppression; and, hence, that there should be a decree for defendant.

BILL IN EQUITY.—This bill was filed to compel the payment of a sum of money alleged to be the difference between complainant's debt and the amount received from a sale of land by defendant holding a deed from complainant absolute on its face, alleged by complainant to have been intended as a mortgage.

William Walker was the original complainant. October 5, 1885, his death was suggested, and Eliza S. Walker, his administratrix, was made a party to the proceedings.

The facts are fully stated in the opinion.

Beniah Watson and *John P. Saulsbury*, for the complainant:

Whenever the relation of mortgagor and mortgagee is once shown to exist, a court of equity views with distrust and disfavor any arrangement between them by which it is proposed to transfer the equity of redemption to the mortgagee. The parties will be held to their original relation, unless the transaction shall appear perfectly fair and no advantage taken by the mortgagee by reason of his incumbrances. *Baughner v. Merryman*, 32 Md. 185;

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Villa v. Rodriguez, 79 U. S. 12 Wall. 326, 20 L. ed. 406.

No matter how absolute a conveyance may be on its face, if the intention is to take security for a subsisting debt or for money lent, the transaction will be regarded as a mortgage and will be treated as such. Parol evidence is admissible to show that an absolute conveyance was intended as a mortgage. *Baughers v. Merryman*, and *Villa v. Rodriguez*, *supra*.

In determining whether a deed absolute on its face is to be allowed to have force and effect according to its import, or is to be declared, as between the parties, to have the effect of a mortgage only for the security of a subsisting debt, it is necessary to determine the manner in which the deed was procured and the object and purposes contemplated by the parties at the time it was executed as shown by all surrounding facts and circumstances. For this purpose parol testimony is admissible. *Baughers v. Merryman*, 32 Md. 186; *Hall v. Livingston*, 3 Del. Ch. 348.

The mortgagee may become the purchaser of the equity of redemption if he does not use his power over the estate to induce the mortgagor to part with it.

In equity a conveyance, in whatever form made, will be treated as a mortgage whenever it appears to have been taken as a security for an existing debt; and a court of equity, in doubtful cases, will so treat it, and allow the grantor the benefit of redemption. *Baughers v. Merryman*, 32 Md. 185; *Cornell v. Pierson*, 4 Halst. Ch. 478; *Horn v. Keteltas*, 46 N. Y. 605; *Bentley v. Phelps*, 2 Wood & M. 427; *Hughes v. Edwards*, 22 U. S. 9 Wheat. 489, 6 L. ed. 142; *Taylor v. Luther*, 2 Sumn. 228; *Babcock v. Wyman*, 60 U. S. 19 How. 289, 15 L. ed. 644; *Russell v. Southard*, 53 U. S. 12 How. 139, 13 L. ed. 927; *Morris v. Nixon*, 42 U. S. 1 How.

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118, 11 L. ed. 69; *Reading v. Weston*, 8 Conn. 120; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Trucks v. Lindsey*, 18 Iowa, 504.

A parol trust, in the absence of any prohibitory statute, may be set up, even against the grantee under a deed absolute on its face, and without any allegation in the bill that the trust was intended to be declared in the deed and was omitted through fraud or mistake.

Parol evidence is admissible to establish a trust as against a deed absolute on its face, when the relation of the parties and the circumstances surrounding the making of the deed were such as that for the grantee to set up the form of the deed as conclusive would constitute a fraud against the grantor.

Such a parol trust may be established against an absolute deed by verbal admissions by the parties charged; and there is no such rule of evidence as to require in such a case proof of facts and circumstances *dehors* the deed and incompatible with the idea of a purchase.

In England, before the Statute of Frauds, 29 Car. II., uses and trusts might be proved by parol where the mode of conveying a legal estate was such as might be by any act *in pais* or by parol.

Section 7 of the English Statute of Frauds, requiring that trusts of lands be proved by writing, was never in force in this State, having been passed after the settlement of Pennsylvania, which then embraced what is now Delaware, and never having been adopted by statute or at common law in this State. *Murphy v. Hubert*, 7 Pa. 420; *United States Bank v. Carrington*, 7 Leigh, 566, 576; *Fleming v. Donahoe*, 5 Ohio, 255; cases cited in *Hull v. Livingston*, 3 Del. Ch. 348; *Pierce v. Robinson*, 13 Cal. 116; *Lodge v. Furman*, 24 Cal. 385; *Grey v. Tubbs*, 43 Cal. 358.

That fraud may be inferred from facts and circum-

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stances, or from the condition of the parties, is well established. *McCormick v. Malin*,⁵ Blackf. 509; *Highberger v. Stiffler*, 21 Md. 338; 1 Story, Eq. §§ 192, 193; 1 Kerr, Fr. 384; 2 Kent, Com. 484; Hill, Tr. § 145.

The defendant corporation having conveyed its title to a *bona fide* purchaser, Walker cannot, as against such purchaser or purchasers, redeem the premises. In such case the equity of redemption having been apparently destroyed, a court of equity will treat the defendant corporation as a constructive trustee for the balance in its hands after deducting from the price for which the land was sold the amount for which the defendant corporation held it as security. *Baughner v. Merryman*, 32 Md. 186; *Linnell v. Lyford*, 72 Me. 284; *Wyman v. Babcock*, 2 Curt. C. C. 386; *Dougherty v. McColgan*, 6 Gill & J. 276; *Henry v. Davis*, 7 Johns. Ch. 41; *Wilber v. Sanderson*, 43 Cal. 496; *Hyndman v. Hyndman*, 19 Vt. 10; *McLanahan v. McLanahan*, 6 Humph. 99; 72 Law Lib. 430-448; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Baldwin v. Banister*, 3 P. Wms. 251; Perry, Tr. § 243; Hill, Tr. 144.

If a person obtains the legal title to property by circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity will raise a trust by construction. Perry, Tr. p. 135, § 166. Counsel also cited: *Webb v. Rorke*, 2 Sch. & Lef. 661, 676; *Ford v. Olden*, L. R. 3 Eq. Cas. 461; *Hyndman v. Hyndman*, 19 Vt. 12; *Alexander v. Rodriguez*, 79 U. S. 12 Wall. 339, 20 L. ed. 410; Perry, Tr. §§ 192, 210; *Budd v. Van Orden*, 33 N. J. Eq. 147, 568; 1 Pow. Mort. 151 a; 1 Hill, Mort. 42; *Hughes v. Edwards*, 22 U. S. 9 Wheat. 494, 6 L. ed. 143; *Morris*

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v. *Nixon*, 42 U. S. 1 How. 121, 11 L. ed. 70; *Strong v. Stewart*, 4 Johns. Ch. 167; *Slee v. Manhattan Co.* 1 Paige, 48, 77; *Westlake v. Horton*, 85 Ill. 229; *Perkins v. Drye*, 3 Dana, 176; *Crane v. Buchanan*, 29 Ind. 570; *Brogden v. Walker*, 2 Harr. & J. 285.

N. B. Smithers, for the defendant :

There are three questions in this case :

(1) Is there anything in the relation of mortgagor and mortgagee to prevent the latter from purchasing the interest of the former ?

(2) Was there in this case any trust, created by agreement of parties, that the bank should sell the lands conveyed to it, and after paying the debts refund the surplus ?

(3) Was there any trust as to such surplus, arising out of fraud or oppression by the creditor taking advantage of the ignorance or necessity of the debtor ?

I. Of the relation between mortgagor and mortgagee in England, see *Cholmondeley v. Clinton*, 2 Jac. & W. 183; *Knight v. Marjoribanks*, 2 MacN. & G. 10.

In Delaware.—A mortgage is but security for the payment of a debt; it creates no trust and establishes no fiduciary relation. The mortgagee has but a chose in action. *Cooch v. Gerry*, 3 Harr. 282; *Hall v. Tunnell*, 1 Houston, 326; *Cornog v. Cornog*, 3 Del. Ch. 416.

In New York.—*TenEyck v. Craig*, 62 N. Y. 421; *Remsen v. Hay*, 2 Edw. Ch. 534.

In Maryland.—*Hinkley v. Wheelwright*, 29 Md. 348.

Text-books.—2 Sugd. Vend. & P. 8th Am. ed. 412, 689; Jones, Mort. §§ 711, 712; 2 White & T. Lead. Cas. 1985.

U. S. Supreme Court.—*Russell v. Southard*, 53 U. S. 12 How. 154, 13 L. ed. 933; *Peugh v. Davis*, 96 U. S. 335, 24 L. ed. 776.

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II. There was no trust created by agreement of parties.

If anything is capable to be proved by human testimony it is conclusively shown that the bank refused to accept the land subject to any such trust; that the deed was executed by Walker and wife with the full knowledge of such refusal. To ask a decree for such a trust is to ask a fraud on the bank.

III. There was no such trust arising out of fraud or oppression on the part of the bank.

There were but three ways by which the bank could realize its debt: By the mode prescribed by law against an unwilling debtor; by the voluntary payment by the debtor,—*i. e.*, in this case by the sale of his lands to third persons and the application of the proceeds to his indebtedness; by agreement between the debtor and creditor resulting in a purchase by the latter.

A sale by the sheriff was deprecated by Walker, who tried to sell at the instance of the officers of the bank, and failed.

IV. It is clearly established, by the testimony, that so far from desiring a conveyance it was the persistent advice of the officers of the bank that Walker should sell his own land; that not until after the trial of the 26th of December, 1882, and the utter failure, did the bank ever consider, with any favor, the proposition to convey; that in every instance the proposal for conveyance came from Walker; that the effort and failure to sell demonstrated to the bank that its debt was in danger by a public sale. Contrast *Villa v. Rodriguez*, 79 U. S. 12 Wall. 329, 20 L. ed. 406.

Inadequacy of Consideration.

If the question were whether the deed, though on its face absolute, was in fact a mortgage, any great disparity

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between the fair value of the property and the consideration given might, coupled with other evidence, be material to resolve the doubt. No such question can arise here, because the proof is full that the deed was executed with the distinct understanding that the bank would not agree to pay back any surplus. This narrows the question to one of fraud,—i. e., that the inadequacy of consideration was so gross as to furnish proof of duress, and that the conveyance was made by a needy and unwilling debtor by oppression.

The actual difference between the total amount of sales and the indebtedness (expenses deducted) was about \$1,700. To aver that the disparity affords any evidence of fraud is monstrous. The debts had been discharged and the bank took all risks. *Hicks v. Hicks*, 5 Gill & J. 85; *Wiest v. Garman*, 3 Del. Ch. 443.

THE CHANCELLOR.—On the 8th day of November, 1873, William Walker executed a bond and mortgage in favor of the President, Directors, and Company of the Farmers' Bank of the State of Delaware, for the sum of \$22,406.37. Mrs. Walker joined in the mortgage.

Fifteen different parcels of land were conveyed by this mortgage. An amicable *scire facias* was docketed, between the bank and Walker and wife, on this mortgage the 23d day of March, 1876, and judgment thereon was recovered by the bank against them, for the said sum of \$22,406.37, with interest from April 18, 1875.

The interest due by Walker and wife to the bank on this judgment being in arrear, a *levari facias* was issued on said judgment on the 26th day of January, 1881, proceedings on which were subsequently abandoned, Walker having made arrangements for the payment of his arrears of interest. The interest being again in arrear, a second *levari facias* on said judgment was issued on the 8th

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day of February, 1882. Walker again making provision for the payment of his arrears of interest, proceedings under the second writ of *levari facias* were abandoned.

On the 14th day of February, a third writ of *levari facias* was issued on said judgment; Walker being again in arrear with his interest, and the principal of said judgment being wholly due and unpaid.

On the 22d day of February, 1883, Walker and his wife executed a deed of conveyance to the bank for nine different parcels of the above-named lands; five of said parcels having been sold at public sale by Walker in the month of December previous, and one of said pieces, called the dry-house lot, being omitted from said deed for reasons clearly stated by witnesses who have been examined in the cause.

The consideration stated in the deed seems to have been nominal, being the sum of \$26,000, the real consideration (as proved by the witnesses) being the release by the bank to Walker of his entire indebtedness to the bank, which then amounted to the sum of \$25,277.36; also the payment by the bank of a mortgage, in favor of one Bespham, on which there appears to have been due about \$6,988.67; and the payment of a judgment of one Pearson against the said Walker, on which was then due about \$85.

The Dupont mortgage had been theretofore assigned to the bank. It and the Bespham mortgage and the Pearson judgment were liens upon the lands of Walker. The entire indebtedness of Walker to the bank, and on account of prior liens which the bank assumed to pay and did pay on the 22d day of February, 1883,—the date of the deed from Walker and wife to the bank,—was the sum of \$32,351.32.

The bank subsequently, at private sale, disposed of all these nine parcels of land conveyed to it by Walker and

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wife. The prices for which the bank sold these parcels aggregated the sum of \$34,870. Of these six sold for \$3,370, leaving for three parcels, \$31,500.

The bank, in its answer, says that by far the greater part in value of these lands were sold by it on credit, and the consideration price for most of them has not yet been received by it, but remains unpaid; but it admits that the aggregate price for which it sold them exceeds the consideration price for which Walker sold them to the bank, to the amount of between \$2,200 and \$2,300.

The bill was filed by Walker in his lifetime, against the bank, to compel the payment by it of this amount, which he claims was equitably due him from the bank.

The question in the case is whether the deed of the 22d day of February, 1883, absolute in its terms, is to be allowed to have force and effect, according to its import, or be declared as between the parties to have the effect of a mortgage for the security of the subsisting debt. The determination of this question depends upon the manner in which the deed was procured, and the objects and purposes contemplated by the parties, and upon the intention of the parties at the time it was executed as shown by all the surrounding facts and circumstances.

The relation of mortgagor and mortgagee existing between the parties at the time of the execution of the absolute deed in question should cause the court, as has been often said in other cases, to view with distrust, and to scrutinize with closeness, the negotiation that led to the making of the deed whereby it is now claimed that the right of redemption has been extinguished and the previous mortgage converted into an absolute sale; or, in other words, whereby the complainant is debarred the right of recovering from the defendant the excess of amount of sales of the mortgaged property over the amount of the indebtedness of the complainant to the defendant at the time of the execution of the mortgage.

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To sustain such a transaction as the sale, without the right of redemption, it requires that all the circumstances attending it should be perfectly fair and free from the least taint of advantage and imposition. While it is everywhere now recognized as true, whatever heretofore may have been the difference of opinion on that subject, that a mortgagee may become the purchaser of the equity of redemption, if he does not use his power over the estate, where he has such power, to induce the mortgagor to part with his interest in it, it is, nevertheless, the policy of the law to prohibit the conversion of a real mortgage into a sale. *Conway v. Alexander*, 11 U. S. 7 Cranch, 218, 3 L. ed. 321.

Although the equity of redemption may be sold or disposed of to the mortgagee, yet, unless the transaction appears to be fair and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor, equity will hold the parties to their original relation of debtor and creditor. *Dougherty v. McColgan*, 6 Gill & J. 275.

In the case of *Baughner v. Merryman*, 32 Md. 185, the court says: "As the debt was not the appellee's and for which she was not personally bound, if the property was really worth more than the mortgage debt at the time, the appellant paid nothing for the right of redemption." Again: "That the proposal to convert the mortgage into a sale was made and urged by the appellant, is fully admitted in his answer; the alternative proposed being either an absolute sale of the property or an immediate foreclosure and sale. That the appellee was distressed and perplexed with such an alternative persistently pressed upon her, it is not difficult to conceive, and as a fact is fully shown by the proof in the cause. She had in fact no power of escape, having agreed to a decree for a foreclosure; the only chance of avoiding being turned out of house and home summarily was by yielding to the

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appellant's demand for an absolute deed. This was an improper use of the mortgagee's power over the estate, to influence the mortgagor to part with the right of redemption, and such as a court of equity will not sanction."

In this case the mortgagee sold the mortgaged premises for more than twice the amount of the mortgage debt; and this is at least some evidence of that inadequacy of price against which a court of equity will relieve. In this case the judge remarked that from a careful reading of the record he was convinced that there was an understanding that, although the deed was absolute on its face, it was to be regarded only as a means of better securing the appellant's debt, and that the surplus to arise from the sale of the property after payment of the mortgagee's debt was to be accounted for to the appellee. Surely there were sufficient reasons in this case for a decree in favor of the appellee without referring to her distress and vexation, which reference was wholly unnecessary. All debtors probably are distressed when their property has to be sold for the payment of their debts; but distress and anxiety on account thereof afford, of themselves, no ground for equitable interposition.

There is no doubt that in equity a conveyance, whatever form it may assume, will be treated as a mortgage whenever it appears to have been taken as a security for an existing debt or a contemporaneous loan; and the inclination of the courts is, in doubtful cases, so to treat it and allow the grantor to redeem.

In the case of *Hinkley v. Wheelwright*, 29 Md. 348, the court says: "Nor does the fact that parties stand in the relation of mortgagor and mortgagee prevent their dealing with each other as vendor and purchaser of the equity of redemption. Such transactions will not be set aside unless for manifest unfairness or inadequacy of consideration."

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In *Hicks v. Hicks*, 5 Gill & J. 85, it was said by the court that a mortgagee may become the purchaser of the equity of redemption if he does not make use of his incumbrance to influence the mortgagor to part with his property at less than its value.

Lord Redesdale, in the case of *Webb v. Rorke*, 2 Sch. & Lef. 673 (which was a case in which the bill prayed that a lease for 999 years, of 29 acres of land which had been mortgaged to Rorke, who subsequently took the said lease from the mortgagor, might be brought into court, together with the mortgage deeds and bonds, and that the defendant might be decreed to reassign the lease to the plaintiff, and that the same might be decreed void, and that the defendant might account for the real value of the lands from the date of the lease), in decreeing in favor of the plaintiff, remarked: "Another objection was that this decision may tend to impeach dealings between mortgagor and mortgagee, for a sale of the equity of redemption. But to this," he says, "a good answer was given at the bar. The cases are totally different, the parties stand in a different relation; if there be two persons ready to purchase,—the mortgagee and another,—the mortgagor stands equally between them; and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him, by applying the purchase money, to pay off the mortgage. It can therefore only be for want of a better purchaser that the mortgagor can be compelled to sell to the mortgagee." He says, however, that "courts view transactions even of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase."

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It was said in *Russell v. Southard*, 53 U. S. 12 How. 154, 13 L. ed. 933, and note, in referring to strong expressions by judges, in some of the cases of dealings between mortgagor and mortgagee, that strong expressions with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule.

"We think," says the court, "that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized when fraud is charged; and that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown to avoid such a purpose. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that any one would have been willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist."

The Farmers' Bank was not a mortgagee in possession at the time the conveyance was made to it by Walker and wife.

The doctrine upon this subject is very clearly stated in the case of *Alexander v. Rodriguez*, 79 U. S. 12 Wall. 339, 20 L. ed. 410, by *Mr. Justice Swayne*, in delivering the opinion of the court. He says: "The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his

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trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was, in all things, fair and frank; and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears of poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law."

It has been truly remarked by Pomeroy, in his *Equity Jurisprudence*, vol. 3, p. 146, that "in no other department has the equity jurisprudence, as administered in this country, departed so widely from that administered in England, as in the department that is concerned with mortgages, and the respective rights, liabilities, and remedies of the mortgagor and the mortgagee." "No correct notion," he says, "can be obtained of equity, as it now exists within the United States, without an accurate and full appreciation of these differences. At the common law the ordinary mortgage was, to all intents and purposes, a conveyance of the legal estate. A mortgage in fee immediately vested the mortgagee with the legal title, subject, however, to be defeated by the mortgagor's performing the condition by paying the money upon the prescribed pay-day."

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In Delaware a mortgage as between the mortgagor and mortgagee so long as the former continues in possession of the mortgaged premises (which was Walker's situation) is merely a security for the payment of money, and does not absolutely convey the legal title to the premises, but is a lien on the property, of so high a nature that it is not divested by a sale on judgments subsequently obtained against the mortgagor, yet if the mortgagee is in possession under the mortgage, and the condition of it be broken, it is no longer in the power of the mortgagor, nor of any one claiming his title by virtue of a sale on such a judgment, to recover the possession in ejectment. His only right in such a case is to redeem the premises by paying the mortgage.

A mortgage in this state, being but security for the payment of a debt, creates no trust and establishes no fiduciary relation; the mortgagee has but a chose in action. *Cooch v. Gerry*, 3 Harrington, 282; *Hall v. Tunnel*, 1 Houston, 326; *Cornog v. Cornog*, 3 Del. Ch. 416.

Such being the nature of a mortgage, and such being the relations between mortgagor and mortgagee in this state, we must consider the allegations of the bill and answer in the cause and examine the evidence in the cause and apply the principles of equity, as judicially declared, to that evidence, so as to arrive at a just conclusion in respect to the controversy between the parties.

The bill expressly charges that the deed bearing date the 22d day of February, 1883, and executed by the complainant and his wife to the Farmers' Bank, was procured by deception and fraud; and that had not the complainant and his wife been deceived, he would never have made an absolute deed to the bank; and that he believes his wife, Eliza S. Walker, would never have joined with him in executing the said deed had she fully understood the nature and purport of the said deed,—

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that it was contrary to the understanding of the complainant and his wife, when they made and executed the deed, that it should be an absolute deed in fee simple.

The bill alleges that the president, directors, and company always insisted, before the execution of the deed by him and his wife, that all they wanted was their actual debt, and gave him to understand by their acts and conduct that they would exact nothing more; that the deed to the bank by Walker and wife was intended by them to be a deed to the bank for the payment of Walker's indebtedness, and was intended by them to be only a deed of trust for the sole and only purpose of liquidating and discharging Walker's indebtedness to the bank; that certain directors of the said bank frequently, in presence of said Walker and wife, insisted that all the said bank wanted was its actual debt, and that the bank did not wish or desire Walker's property for speculative purposes; and that said language was employed by the agents, officers, and directors of the bank to get Walker and his wife to make an absolute deed in fee simple to the bank; that the bank accepted the deed as a deed of trust from Walker and his wife for the sole and only purpose of discharging Walker's said indebtedness; and that the bank would pay over to Walker whatever surplus there might be after said indebtedness was fully paid and discharged. Such at least is the contention of the complainant.

If these allegations and charges of the bill are proved to be true, there is an end of this case, and a decree should be entered in favor of the complainant, against the defendant, for the amount of the excess which the defendant has received from the sales of the land conveyed by the complainant Walker to the defendant, or the excess of the sales of the land over the amount of said indebtedness. In such case the defendant would be chargeable

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with the amount of sales, whether received by it or not, because it would not avail it, in this court, to allege and prove that the sales made by it were upon credit, and that a large portion of the amount of sales had not in fact been received, owing to such credit having been given.

But the important questions are: Have these charges of the bill been proven? Are they supported by the evidence in the cause?

There has certainly been no contract proved between the complainant and the defendant prior to the meeting, at the house of Walker, between Walker and his wife and the two Mr. Ridgelys, the president and attorney for the bank, at which Mr. Watson and Harry A. Richardson were present. It is reasonable to infer from the testimony that prior to that time there had been conversations between one or both of the Ridgelys and Walker, in which Walker had suggested that sooner than a public sale should be made of his lands he would convey them to the bank; and that he had asked Edward Ridgely whether the bank would not sell his lands and pay over the surplus beyond his indebtedness to him.

There is no proof that both or either of them ever agreed to do so. Mr. Edward Ridgely states that such conversations and suggestions were made long before the meeting at Walker's house, and that the proposition was never seriously entertained. It seems from the testimony of both the Mr. Ridgelys that they had persistently urged Mr. Walker to make sale of his lands himself or by an agent, and thus pay off his indebtedness or greatly reduce it.

It is in proof that Mr. Walker on the — day of December, 1882, through Harry A. Richardson, his agent, offered his lands at public sale in the town of Dover, which sale was well attended, and that after sell-

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ing six parcels of said land the remaining parcels were withdrawn from sale, owing to the inability to obtain purchasers at an amount therefor such as Mr. Walker judged proper.

It was after the failure to realize from said sale a sufficient amount to pay Walker's indebtedness that the bank—as its attorney states in his testimony—seriously considered the propriety of taking from Mr. Walker a conveyance of his lands in payment of his indebtedness to it. The meeting at Walker's house was, if I mistake not, early in the first week of February following.

It appears from the testimony, that that meeting was at the instance and upon the invitation of Mr. Walker, with a view of making arrangements as to his indebtedness to the bank. Walker submitted an estimate of what he supposed to be the value of his real estate, and assured the Messrs. Ridgely that it was more than sufficient to pay his indebtedness. They did not agree with him in opinion, and asserted that the bank would be the loser of a portion of their debt, by reason of the insufficiency of his real estate to pay it.

It is in proof, and uncontradicted, that Walker at that interview proposed to deed all his real estate remaining unsold, to the bank, with the exception of what is called the dry-house lot, which, for reasons stated by him, he would not include in the conveyance in discharge of his indebtedness.

They insisted that the dry-house lot should be included in the conveyance, and at first, as stated by Mr. Watson, declined to lay Mr. Walker's proposition before the board of directors of the bank, who were to meet that morning. After considerable contention as to whether the dry-house lot should or should not be included in the conveyance between Walker and the Ridgelys, they stated that they would lay Walker's proposition before the board of di-

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rectors. It is proved that it was laid before the board, and that after some consideration,—it being considered that the costs of a sheriff's sale of the real estate of Walker would about equal in amount the sum which the bank would receive from a sale of the dry-house lot after paying prior mortgages and liens thereon—the board of directors of the bank agreed to accept Mr. Walker's proposition, and instructed their attorney to notify Mr. and Mrs. Walker thereof. He did so notify them immediately; and in pursuance of the agreement, afterwards, and perhaps the next day, set about preparing a deed of conveyance by Walker and wife to the bank for the nine parcels of land of Walker remaining unsold, exclusive of the dry-house lot.

After the preparation of the deed had been commenced, it is proved by the attorney of the bank that he received from Mrs. Walker, wife of William Walker, a note stating that she had reconsidered her determination about signing the deed, and that she would not sign the deed conveying Walker's land to the bank unless the bank would pay to her the surplus of sales of said land that should remain after discharging Walker's indebtedness to the bank. The preparation of the deed was thereupon suspended.

At the next meeting of the board of directors, the attorney of the bank stated to the directors that he had received such a note from Mrs. Walker. The note was shown to the directors, and, as proved in the cause, they unanimously rejected Mrs. Walker's proposition, and refused to accept a conveyance of the land upon the conditions proposed by her. They also as stated by Mr. Ridgely, the attorney, ordered him to proceed by *levari facias* and sell the lands of Mr. Walker for the payment of their debt.

The attorney states that he immediately informed Mr.

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Walker and his wife of this action of the board of directors, and proceeded to act in conformity with the instructions of the bank. The third *levari facias* was issued, but proceedings under it, he states, were temporarily suspended at the instance of Mrs. Watson, a daughter of William Walker, until Harry A. Richardson who was absent from town, should return from New York.

Upon Mr. Richardson's return home he called upon the attorney of the bank, inquired what was the matter in the Walker business, and being informed of the situation of matters owing to the reception of the note from Mrs. Walker, and rejection of its terms by the bank, he (Richardson), as stated by Mr. Ridgely, told him to go on and prepare the deed and he would have it signed.

The deed was prepared and taken by Mr. Richardson to Walker's, and signed and executed by Walker and his wife and returned by Richardson to the attorney of the bank.

Some stress was laid in the argument upon the fact that Mr. Richardson stated that when he received the deed to be taken to Walker, Ridgely requested him to induce Walker and wife to sign it. Ridgely says he does not remember and does not believe he made that remark. It does not seem material, however, whether he did or not; for it does not appear in evidence that Mr. Richardson, the son-in-law, held out any inducement to Walker and wife to sign the deed. He expressly says that nothing was said about paying over a surplus to Walker and wife, but that he should not have advised a sale of all Walker's lands to the bank if it had not been to avoid a forced sale.

By forced sale Mr. Richardson, I suppose, must have meant a sale by the sheriff, under the *levari facias* which had been issued by the bank, on its judgment obtained

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upon *scire facias* against Walker. There can be no doubt that the bank had a perfect legal right to cause this writ to be issued on its judgment, and to have it promptly executed by the sheriff of Kent County, where Walker's lands were situate. That was a right of the bank, to the exercise of which Mr. Walker had no legal right to object. It was a right the exercise of which this court would have had no authority to prevent, if its restraining power had been invoked. Nor is this the kind of incumbrance which the decisions above referred to contemplate, and which they declare a mortgagee in possession shall not use to obtain a conveyance from the mortgagor of his real estate. It was but the employment of the prescribed form of legal process for making the money due by the defendant to the plaintiff on a judgment legally recovered in a court of law.

It is true this process is called a *levari facias*, and is executed upon specific lands instead of upon lands generally; but this in no wise affects the legality or the equity of its use where it is the prescribed and appropriate process. A mortgagee may even purchase at his own sale without becoming a trustee for the mortgagor. There is no difference in the testimony of Mrs. Watson, Harry Richardson, and the Messrs. Ridgely, in respect to the consideration of the deed executed by Walker and wife in favor of the bank. It is true that Mrs. Watson and Mr. Richardson testify as to declarations made by both the Mr. Ridgelys during the interview at Walker's, as to the bank being a rich and powerful corporation and as to its being able to give better terms than Walker could give to the purchasers of his real estate; but it must be remembered, even if such declarations are taken to be proved, that the chief contention in that conversation was as to the value of Walker's real estate, and as to its sufficiency to pay his indebtedness to the bank, and

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whether the dry-house lot should be included in any conveyance that might be made by Walker and wife to the bank, or whether the said lot should not be included therein. Walker insisted that his other real estate was amply sufficient to discharge his indebtedness to the bank without a conveyance of that lot, and the Ridgelys contended that the whole of the real estate would not be sufficient to discharge said indebtedness and the bank would be loser by taking such conveyance. Both the Ridgelys either denied that such declarations were made, or say that they do not remember to have made them; but whether made or not, a sufficient explanation of their meaning may be found in the contention as to the sufficiency or insufficiency of the property of Walker at a public sale to discharge his indebtedness to the bank.

Mrs. Watson says: "The deed which was subsequently agreed upon and made by the said Walker and wife to said bank was so made and given upon the express understanding that it was in discharge of the indebtedness of said Walker to said bank, and the assumption to pay the Bespham mortgage and the Pearson judgment."

The dry-house lot was omitted and left out of the deed, because it was made apparent that the said Walker and wife would not make a deed to the said bank unless it was so omitted; and because it was shown that the costs of a sheriff's sale would equal, if not exceed, the amount which the bank would receive from a sale of the dry-house lot; and because she (Mrs. Watson) had advanced about half the money to build the house thereon.

No agreement between the two Mr. Ridgelys, two of the directors of the Farmers' Bank, and Mr. Walker, has been proved to have existed previous to the meeting at the house of Mr. Walker, spoken of by the witnesses, that the Farmers' Bank would take a conveyance of

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Walker's real estate, sell the same and pay over the surplus of sales to Mr. Walker, after his indebtedness to the bank was discharged. No such agreement has been proved to have been made or mentioned by any of the parties present at said meeting ; and such an agreement is denied by the bank to have been made by it, or by any persons speaking for or on behalf of it. And such denial is also made by Dr. Ridgely, the president of the bank, and by Edward Ridgely, its attorney, witnesses in the cause ; but the inference, perhaps, is sought to be drawn from the declaration said by Mrs. Watson and Mr. Richardson to have been made, both by Dr. Ridgely and Edward Ridgely, that "all the bank wanted was its debt," and the remark made by Mr. Walker, he wanted the bank to be paid all he owed it.

But it would be doing violence to the language used on that occasion to establish a fact by inference, from language not remembered or denied, to support a theory, or establish as a fact that which is conclusively disproved by other controlling facts and circumstances.

It is proved that the board of directors of the bank, after accepting the proposition of Mr. Walker, and after their acceptance had been notified to Mr. and Mrs. Walker, refused to accede to Mrs. Walker's proposition subsequently made to Edward Ridgely, attorney for the bank, that the bank should agree to pay over to her any surplus of sales of Walker's lands which should remain after the payment of Walker's indebtedness to the bank, and that said directors unanimously rejected said proposition ; and their rejection thereof was notified to both Mr. and Mrs. Walker before the execution of said deed.

There is a very significant fact connected with this matter, which is worthy of consideration. It nowhere appears in the bill or proofs in this cause that Mr. Walker ever refused to execute a deed to the bank in conformity

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with his proposition to the bank, and which was accepted by it. It nowhere appears that he ever reconsidered his determination to sign such a deed.

The whole difficulty in respect to the question of paying over any surplus that might remain after the payment of Walker's indebtedness to the bank to Mrs. Walker, and the delay in the preparation and execution of the deed, seems to have arisen out of the note addressed by Mrs. Walker to the attorney of the bank, and which he laid before the board of directors at their subsequent meeting.

This is said, not to censure the action of Mrs. Walker. She, as a prudent and sensible woman and wife, desired all the advantage of any contingency that might arise in the disposition of her husband's property by the bank. For this she certainly was not to be blamed, but to be commended. The result of this action, however, was the express refusal of the directors of the bank to agree to the proposition, when formally made, to pay over any such excess of surplus to Mrs. Walker or any one else. And its nonagreement thereto rests, not in conjecture or inference, but rests in positive proof.

I do not think, therefore, on the proofs in this cause, that the deed from Walker and wife was procured by deception and fraud, as charged in the bill. I do not see how it can possibly be that when the complainant and his wife executed the deed, they should not have considered it an absolute deed in fee simple; but I can readily perceive how it might have been possible for Mr. Walker, who had formerly, and for many years, been a depositor in said bank, and friendly in his personal relations with the directors, to have indulged the hope that there would be a surplus from the sale of the property conveyed to the bank, after paying his indebtedness to it, and that the bank might (in the exercise of a generous

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spirit) pay over to him such surplus. But generosity, simply as such, is not an enforceable equity; its tribunal is in the human breast, and not in the courts of earth.

But although the directors of the bank might have positively refused to pay over to Walker any surplus of sales of the real estate conveyed by him and his wife to the bank, which might remain after the payment of Walker's indebtedness to the bank, yet, if the principles of equity and good conscience, as administered in equitable tribunals, make it inequitable that the bank should retain such surplus, and not pay it over to Walker, this court will decree that it shall do so, notwithstanding such refusal by the bank.

Was there manifest unfairness by the bank in procuring the deed from Walker and wife? Was Mr. Walker compelled in any manner to sell to the bank otherwise than from the want of a better purchaser? Did he sell to the bank for less than others would have given? Was the consideration for the conveyance inadequate and coupled with unfairness or oppression in any respect?

These several questions must, in accordance with the proofs in this cause, be answered in the negative.

As to inadequacy of price, there is no proof that any greater amount had ever been offered for the several parcels. And the attempt to dispose of them by public sale by Walker, and the inability to realize an amount greater than that of the indebtedness to the bank, or even that amount, precludes the idea of such inadequacy of price, even if that is to be considered when not coupled with unfairness in a sale.

I think it is manifest, from the reading of the testimony in this cause, that most, if not all, of the alleged surplus of sales was caused by the personal exertions and perseverance of some of the directors of the bank, and especially to those of Dr. Ridgely, the president. His

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keen business tactics were displayed in his negotiations with Mr. Everests, the purchaser of the millpond tract, by which \$1,000 were secured beyond the purchasers' *ultimatum*, constituting nearly one half of the surplus of sales remaining after deducting the amount of Walker's indebtedness to the bank, and the payment of the Bespham mortgage, and the Pearson judgment. Mr. Walker would have had no right to demand the exercise of such vigilance on his own part, and could not claim a right to appropriate to himself its advantages.

There certainly was no expressed trust in this case. I do not consider that an implied one or a constructive trust arises or can be created from or out of the evidence in the cause.

The decree is therefore in favor of the defendant.

Syllabus.—Statement.—Attorneys' names.—Opinion.

EDWARD C. LEARY

vs.

ANN E. KING and MARY LEARY.

New Castle, Sept. T. 1887.

Conveyance by betrothed woman, in fraud of marital rights.

A court of equity will protect a husband against a voluntary conveyance by his intended wife of all her estate, to the exclusion of the husband, made pending an engagement of marriage; even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not.

BILL TO SET ASIDE DEEDS.—The facts are stated in the opinion.

Anthony Higgins for the complainant.

James H. Hoffecker for the defendants.

THE CHANCELLOR.—It sufficiently appears by the bill, answer, and proofs in this cause, that Lucinda Loper on or about the 5th day of August, 1876, was married to the complainant; and that she afterwards died on or about the 29th day of September, 1885. There were two children born to the husband and wife during their marriage.

The said Lucinda Loper was in her lifetime and before her marriage with the complainant, seised and possessed of two certain lots or parcels of land and tenements situate in the city of Wilmington, in this State, which are particularly described in the bill of complaint. After engagement of marriage by the said Lucinda with the said

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complainant, during its pendency, and before the marriage, without the knowledge and consent of the complainant, the said Lucinda made, executed, and delivered a conveyance and deed of gift of the said lands and tenements to Ann E. King, one of the defendants. Ten days after the execution and delivery of the said deed, and while the complainant was in ignorance of any deed or conveyance by the said Lucinda, she and the complainant were married. Shortly after the death of said Lucinda, Ann E. King made, executed, and delivered a deed of all the said lands and tenements, without the knowledge of the complainant, to Samuel Culbert. It appears that no consideration for said conveyance was ever paid by the said Culbert to Ann E. King.

One of the children of the said marriage died in the lifetime of its mother. Mary Leary, the other child, still survives.

The alleged consideration of five hundred dollars, for the said deed, by Ann E. King to the said Samuel Culbert, has never been paid by the said Culbert to the said Ann E. King, nor was the same or any part thereof ever paid by the said Samuel Culbert and Ann E. King, or by either of them, to the complainant or to the said Mary Leary or to any one for the said Mary Leary.

Culbert on the 4th day of April, 1887, for a nominal consideration, granted and conveyed the said two parcels of land and premises which had as aforesaid been conveyed to him by Ann E. King, to the said Mary Leary, an infant of about five or six years of age.

Ann E. King and the guardian of Mary Leary have answered the bill, and in respect to all material matters have confessed the facts, as stated in the bill, to be true.

The bill prays, among other things, that the said deed of Lucinda Loper to Ann E. King may be decreed in fraud of the marital rights of the complainant, and void;

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that the said deed of the defendant Ann E. King to Samuel Culbert may be decreed to have been made in fraud of the rights of the complainant, and void; that the said deed of the said Samuel Culbert to Mary Leary, the surviving infant child of the said marriage, be decreed to be in fraud of the rights of the complainant, and void to the extent that the same shall be set aside for and during the lifetime of the complainant; and that the complainant, as the husband of the said Lucinda Leary, be decreed to have title to and possession of the said lands and tenements, as the tenant by the curtesy for and during his life.

I must consider the statement of fact contained in the bill as sufficiently confessed and proved before me; and I have no hesitation in deciding what the decree in this case should be. This case must be ruled in accordance with the principles decided in the case of *Chandler v. Hollingsworth*, 3 Del. Ch. 99.

In that case *Chancellor* Bates said: "It is enough to say that this court will protect a husband against a voluntary conveyance or settlement by the wife of all her estate to the exclusion of her husband, made pending an engagement of marriage, without his knowledge prior to the marriage; even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not. The concealment of what it is the right of the husband to know, and what it is the duty of the wife to disclose, is itself fraud in law. It is a doctrine of equity,—not so fully developed at the date of *Strathmore v. Bowes*, as now,—that the concealment, to the prejudice of another party with whom one is dealing, of facts which, if known to him, might affect his decision, and which there is an obligation arising out of the transaction to disclose, is a fraud. It is so treated in equity, without respect to the motive of the party in the concealment; being what is

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termed a constructive fraud. But whether a conveyance or settlement made under the circumstances I have stated is always void, or whether it may be sustained upon such equitable considerations as were admitted in the earlier English cases, and in *St. George v. Wake*, 1 Mylne & K. 610,—such as, the reasonableness of its provisions as being made for children of a former marriage, or its embracing only a part of the wife's estate; or such as the husband's inability to make a settlement upon the wife, —I leave as questions open in this State until they arise judicially."

I have no doubt that each and all of the afore-mentioned deeds of conveyance were in fraud of the marital rights of the complainant, and that as against him and his rights they should be decreed fraudulent and void; and I shall decree that he is entitled to a life estate, by the curtesy, in the said two several lots and parcels of land and premises.

Lucinda, the wife of the complainant, was a poor, ignorant negress, and died possessed of no personal property. The said Mary Leary is an infant of very tender years, and was at the execution of said deeds and is now, perhaps, incapable of any intention of fraud. Ann E. King was and is an ignorant woman, and denies, which perhaps is true, any intention of fraud. Samuel Culbert, a white man and the most guilty perhaps of fraudulent intention of any of the parties named in the proceedings before the court, is not a party to these proceedings. The complainant is an ignorant negro, but he is entitled to his rights; and I shall decree that he is unaffected in those rights by any of the conveyances hereinbefore mentioned, and that as against his marital rights those conveyances were fraudulent and void.

Let a decree be drawn accordingly.

Syllabus.—Statement.—Argument for complainant.

SAMUEL HUTCHISON, JR.,

vs.

SAMUEL ROBERTS and DANIEL PALMATORY.

Kent, Sept. T. 1887.

Sureties for different debts of same principal; doctrine of contribution does not apply.

1. Where there are two or more sureties for the same principal debtor, or for the same debt or obligation, whether on the same or different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize the common burdens.
2. The same doctrine applies and the same remedy is given between all those who are jointly or jointly and severally liable on contract, or in the nature of contract.
3. This principle does not apply where the debt or obligation for which there are two or more sureties for the same principal debtor is not the same.
4. One or more obligees in a bond of indemnity given to three persons by a principal debtor for whom they were severally sureties, but not for the same debt or obligation, and on different instruments, according to their liability as such sureties for the principal debtor, are not liable to account in equity to their co-obligee in said bond for the sale or assignment of their individual interest in said bond of indemnity or judgment thereon, or for the money received from a purchaser of said interest for a valuable consideration.

BILL FOR CONTRIBUTION.—The facts and questions presented are fully stated in the opinion.

C. H. B. Day, for the complainant:

Choses in action are property. 1 Bouv. L. Dict. p. 227; Whart. L. Dict. p. 142.

Argument for complainant.

Bonds and mortgages pass under the designation of goods and chattels. 2 Wms. Exrs. R. H. Small's ed. 1841, p. 853, § 4; *Anonymous*, 1 Peere Wms. 267; *Ryall v. Rolle*, 1 Atk. 176-182; 1 Bouv. L. Dict. 224, 563.

Bonds were not assignable at common law, but are made so by the statutes of this State. An obligation given to two or more persons is joint, and suit must be brought by them jointly during their joint lives; after the death of any of them the right accrues to the survivors and finally to the representatives of the last survivors so far as respects the enforcing the claim against the opposite party, and each is not a creditor for his separate share. Duke of York's Laws, pp. 12, 210; Colonial Laws, p. 52; 1 Del. Laws, chap. 49, p. 117; Hall, Dig. 1829, p. 42; p. 224, § 11; Code 1852, title 9, chap. 63, pp. 184, 185, §§ 8, 9; Id. chap. 105, p. 375; State Const. 1792; 1 Del. Laws, art. 6, p. 41, § 11; Const. 1831, art. 6, p. 35, § 18; 2 Poth. Obl. pp. 56-58; Whart. L. Dict. p. 103; *Lane v. Stacy*, 8 Allen, 41; *Doolittle v. Dwight*, 2 Met. 561-563; *Richardson v. Jones*, 1 Ired. L. 296; *Haughton v. Bayley*, 9 Ired. L. 337.

Bond is contract. Every contract derives its effect from the intention of the parties; that intention as expressed or inferred must be the ground and principle of every decision respecting its operation and extent, and the grand object of consideration in every question with regard to its construction. 2 Poth. Obl. p. 35, No. 5, p. 39; Story, Cont. chap. 20, §§ 633, 634; *Arlington v. Merricke*, 3 Saund. *412; *Liverpool Waterworks v. Atkinson*, 6 East, 508.

By the terms of the condition of the bond as expressed therein as follows: "Note: This bond is given as further security as my indorser on certain judgment bonds, and for the mutual benefit of each party named in the within obligation, according to liability for me as surety,"—

Attorney for defendants.—Opinion.

the obligees were joint owners of the bond; and all moneys received by sale and assignment or otherwise were the joint money of all of them according to their liability as indorser on certain bonds, and if one or more of them received from any source more than their proportionate part they were trustee or trustees for the others. It is immaterial whether it was the money of Mrs. Bewley or Mr. Bewley, or the money of a stranger—the doctrine of trusteeship applies. Any one or more of them could receive all or part, compromise the joint claim, release the debtor; and their co-obligees would be bound by it. Any general principle may be modified by agreement. *Dering v. Winchelsea*, 1 Cox, Ch. 318; *Butler v. Birkey*, 13 Ohio St. 514; *Tyus v. DeJarnette*, 26 Ala. 280; *Brown v. Ray*, 18 N. H. 102; *Austin v. Hall*, 13 Johns. 286; *Haughton v. Bayley*, 9 Ired. L. 347; *Fitch v. Forman*, 14 Johns. 172; 1 Selw. N. P. 588; *Scribner v. Adams*, 73 Me. 541–550; *Goodman v. Northcutt*, 24 Reporter, No. 1; *Doolittle v. Dwight*, 2 Met. 561; Pothier Obl. p. 474.

Nathaniel B. Smithers for the defendants.

THE CHANCELLOR.—The complainant, Samuel Hutchison, Jr., was surety for John H. Bewley, to one Tilghman Foxwell, in a judgment bond for the payment of \$1,000. Samuel Roberts was surety for said Bewley to Charles Numbers in a bond, the debt of which originally was the sum of \$1,000.

Daniel Palmatory was surety for said Bewley to William Sharp for the sum of \$700. Bewley on the 12th day of October, 1878, executed a judgment bond to said Hutchison, Roberts and Palmatory in the sum of \$3,900, conditioned for the payment to them of the sum of \$1,950. In the body of the bond there was a note in the

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words: "This bond is given as further security as my indorser on certain judgment bonds, and for the mutual benefit of each party named in the within obligation, according to liability for me as surety."

Judgment was entered on the bond so executed by Bewley in favor of his said indorsers on the 14th day of October, 1878. The several sureties afterwards paid the several sums of money, respectively, for which they were respectively sureties. The sum paid by Hutchison on the 13th day of July, 1882, was \$1,290. Samuel Roberts, on the 12th day of December, 1881, paid the sum of \$630.05 principal and interest to Charles Numbers.

Daniel Palmatory paid to William Sharp, on the 10th day of December, 1881, the sum of \$875 principal and interest; and each of the sureties respectively took assignments of the evidences of their indebtedness respectively, as sureties for said Bewley.

On the 12th day of December, 1881, Daniel Palmatory assigned, transferred, and set over all his part, share, and interest in the judgment in favor of Samuel Hutchison, Jr., Samuel Roberts, and Daniel Palmatory *versus* John H. Bewley, unto Mary J. Bewley, wife of John H. Bewley, at her risk of collection, in consideration of the sum of \$700, with interest thereon from October 10, 1878, that being the amount for which he, said Palmatory, was liable as surety for said John H. Bewley, and which had been paid by him.

On the same day Samuel Roberts made a similar assignment of his part, share, and interest in said judgment, for the sum of \$630 (being the sum for which he was liable as surety for said John H. Bewley, to Charles Numbers), unto the said Mary J. Bewley, wife of John Bewley, expressly at her risk of collection. The judgment of Samuel Hutchison, Jr., Samuel Roberts, and Daniel Palmatory *v.* John H. Bewley, was the same

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judgment recovered by them against John H. Bewley on the said bond, executed in their favor by Bewley to them as his sureties as aforesaid.

It is not disputed, but in fact admitted, that the money so paid to Palmatory and Roberts as a consideration of their respective assignments in said judgment to Mary J. Bewley was her own individual and exclusive property and money, and not the money of John H. Bewley her husband.

Hutchison has never received anything from anybody in consideration or payment of his share, part, and interest in said judgment of himself, Roberts, and Palmatory against Bewley, and has never made any assignment thereof to any person. It seems that John H. Bewley was, at the time he executed the said bond in favor of Samuel Hutchison, Jr., Samuel Roberts, and Daniel Palmatory, and is now, insolvent. In his bill filed in this case Hutchison, the complainant, prays:

"1. That the said Samuel Roberts may be decreed a trustee for your orator for the sum of \$178.26, with interest thereon from the 12th day of December, 1881; and that the said Samuel Roberts be decreed to pay to your orator the said sum of \$178.26, with interest thereon from the 12th day of December, 1881.

"2. That the said Daniel Palmatory may be decreed a trustee for your orator for the sum of \$247.56, with interest thereon from the 12th day of December, 1881; and that the said Daniel Palmatory be decreed to pay to your orator the said sum of \$247.56, with interest thereon from the 12th day of December, 1881.

"3. That the said Samuel Roberts and Daniel Palmatory may be decreed trustees for your orator for the sum of \$425.82, with interest thereon from the 12th day of December, 1881; and that the said Samuel Roberts and Daniel Palmatory be decreed to pay to your orator the

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said sum of \$425.82, with interest thereon from the 12th day of December, 1881.

"4. That the said Samuel Roberts may be decreed a trustee for your orator, for the excess he received beyond his just and equitable *pro rata* share or part which shall be found in the determination of this cause; and that he be decreed to pay the same to your orator, with interest thereon from the 12th day of December, 1881.

"5. That the said Daniel Palmatory may be decreed a trustee for your orator, for the excess he received beyond his just and equitable *pro rata* share or part which shall be found in the determination of this cause; and that he be decreed to pay the same to your orator, with interest thereon from the 12th day of December, 1881.

"6. That the said Samuel Roberts and Daniel Palmatory may be decreed trustees for your orator, for the excess they received beyond their just and equitable *pro rata* shares or parts which shall be found in the determination of this cause; and that they be decreed to pay the same to your orator, with interest thereon from the 12th day of December, 1881.

"7. That the complainant may have such further or other relief as the nature of the case may require."

The contention of the counsel for the complainant, if I properly understand him, is that the bond to Hutchison, Roberts, and Palmatory being joint, any payment by anybody for any interest therein, or as a consideration for the assignment of any interest therein, by any of the obligees therein, necessarily enures to the benefit of all the obligees in *pro rata* proportions, or according to their respective interests therein, as the several sureties of the said John H. Bewley. His idea seems to be that the bond itself being property, anything received on account of any interest therein must be applied equitably for the benefit of all the obligees.

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Now it is true that in one sense the bond executed by Bewley, in favor of Hutchison, Roberts, and Palmatory is property, but property not in Bewley, but the obligees in said bond; it is what is called a chose in action. As such it is payable to, assignable by, and descendible from, the obligees, beneficially, according to the interests of each therein.

It is no property of John H. Bewley, nor assignable by nor transmissible from him. It is a burden or obligation upon him which is legally enforceable against any estate he may have or acquire; and in case of his death, remaining unpaid, it would not be assets of his estate, but would constitute a debt which the assets of his estate would be bound to pay.

The only effect of the assignment of his interest in the judgment against Bewley by Roberts to Mrs. Bewley was the substitution of her in his place, or rather to his interest therein as his assignee. The same may be said in respect to the assignment by Palmatory to her. These assignments in no respect operate as a payment by John H. Bewley, or discharge his obligation to pay any part of said judgment to any person entitled to any interest therein, whether as an original obligee or as an assignee of such obligee. The obligation of Mr. Bewley remains the same as to amount of payment on said judgment as it was at the time of the confession thereof. The beneficial interests therein have only in part been changed by the assignments made by two of the obligees to Mrs. Bewley at her own risk; so that since the assignments the beneficiaries in any money which may be received on said judgment are Samuel Hutchison, Jr., and Mary J. Bewley, and not Samuel Hutchison, Jr., Samuel Roberts, and Daniel Palmatory.

But this in no manner affects the share and interest which Mr. Hutchison will be entitled to receive out of

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the moneys which may be received hereafter from John Bewley or his estate on said judgment.

I do not understand that it was denied in the argument that each of the obligees in said bond had such a beneficial interest therein as was in equity assignable. Indeed, no question could have been raised in this respect. The right is too clear to be questioned. The only contention is whether or not Mr. Hutchison, the complainant, is entitled in equity to have a *pro rata* share, according to the condition of the bond from Bewley to Hutchison, Roberts, and Palmatory, of the money received by Roberts and Palmatory from Mrs. Bewley, as their assignee. If Hutchison is so entitled, it must be upon the equitable principle of contribution among individuals, subject to a common burden, and where one bears more than his proper share thereof.

This right of contribution in equity may be thus described: Where there are two or more sureties for the same principal debtor and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all his cosureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens.

The same doctrine applies and the same remedy is given between all those who are jointly and severally liable on contract or obligation in the nature of contract. The right, however, may be controlled or modified by express agreement among the cosureties or debtors. This doctrine of contribution rests upon the maxim, "Equality is equity."

Although contribution is based upon general considerations of justice, and not upon any notion of an implied promise, a jurisdiction at law has become well settled

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which is sufficient in all ordinary cases of suretyship or joint liability.

The equitable jurisdiction, however, still remains and has some important advantages. All the cosureties and the principal debtor being parties to the equity suit, the liabilities of each, and their exoneration by the principal debtor, can be adjusted and established by a single decree. If one or more of the cosureties are insolvent, the plaintiff can in equity obtain a proportionate increase of contribution from the others that are solvent. It seems, however, that the surety must first resort to the principal debtor, and that he can only compel contribution in equity when he has failed to obtain exoneration from the principal. In the case before me, however, it is admitted that John Bewley is insolvent. While the right to contribution exists among sureties, exoneration exists as against the original debtor; and hence it follows that the payment made by the principal debtor to one or more of the sureties, or any assignment or receipt by such, of the lands, goods, chattels, rights, or credits of the principal debtor, will enure to the benefit equally of the other cosureties to whom such an assignment or transfer has not been made; and they will be entitled to contribution by the sureties to whom such assignment or transference may have been made. See 3 Pom. Eq. Jur. § 1418, and notes, where the authorities are very numerous cited.

These principles conclusively show that the money, property, and effects which have been received by one cosurety in discharge or payment of a debt of a principal or towards a relief from the payment of such debt must be the money, property, and effects of the principal debtor, and not those of a purchaser of an interest due in an obligation by the principal to the sureties or other persons.

It is not even suggested in the present case that either

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Roberts or Palmatory has ever received any money, property, or effects of John Bewley, the principal debtor, towards the payment of the principal debt or towards their relief for the payment of the same debt or obligation. And it cannot be contended, successfully at least, that the money or other effects of Mrs. Bewley was subject to the payment of any debt of John Bewley. She had a perfect right to do what she pleased with her own; to throw it away; to give it away; or purchase from any one any property or debt to which such person might be entitled, even these two sureties, Roberts and Palmatory, in an obligation due by her husband to Hutchison and themselves; and no principle of equity as administered in equitable tribunals can compel them to share the amount so received by them from her.

The bill of complaint is dismissed.

Syllabus.—Statement.

WILLIAM CUMMINS

vs.

NOBLE T. JERMAN.

Kent, Sept. T. 1887.

Evidence; rules of court; answer under oath.

By force of the rules of this court, when the allegations of the bill are sustained by a single undiscredited witness the complainant will be entitled to prevail as against a sworn answer, where no interrogatories were annexed to the bill and an answer under oath was not required.

BILL FOR AN INJUNCTION.—The bill in this case is filed to restrain the collection of a debt, evidenced by judgment, from William Cummins, the surety therein, by Noble T. Jerman, to whom said judgment was confessed.

The bill states that Isaac D. Hamilton and William A. Cummins, they doing business under the firm name of Hamilton & Cummins, on or about March 17, 1885, executed and delivered their joint and several judgment bond to Noble T. Jerman, for the real debt of \$900, bearing date the day and year aforesaid and payable, with interest thereon, on or about the 17th day of June, 1875; that William Cummins at the special instance and request of said Hamilton & Cummins became their surety in said judgment bond; that said Cummins executed the bond for the sole benefit of said Hamilton & Cummins and as their surety only; that said Jerman on the 15th day of March, 1877, entered judgments severally and caused execution thereon to be executed against said William Cummins, the surety, and caused his property be seized and levied upon; that Jerman afterwards agreed with Isaac D. Hamilton, acting for himself and partner, in consideration of the sum of forty-five dollars,

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to forbear the collection of said debt for the period of one year; that the said agreement and payment of money by the said Hamilton and Cummins, his partner, was without the privity and consent of William Cummins, the surety, and that by reason thereof the said surety was greatly damnified; that said Hamilton & Cummins were doing business as merchants, and had possession of a large stock of goods and merchandise at the time that such extension of one year was given to them in consideration of the payment by them to said Jerman of forty-five dollars as aforesaid; and that said Hamilton & Cummins afterwards became insolvent and unable to pay the said judgment to the said Jerman; and that by reason of such extension of one year of the time for the payment of said debt for the consideration aforesaid, the said surety became and was wholly released, exonerated, and discharged from all liability on said bond or on the judgment entered thereon.

The said William Cummins, surety aforesaid, the complainant in this cause, prays that the said Noble T. Jerman, the defendant, may be perpetually enjoined from all further proceedings on the said judgment or on the execution thereon issued, and from the collection of the same or any part thereof out of the complainant.

Jerman, in his answer, admits the execution and delivery of the bond and the entry of judgments thereon, but denies that such extension of time was given in consideration of the payment of the sum of money as aforesaid; he denies that any agreement or understanding was had between himself and the said Isaac D. Hamilton that he would either forbear to collect the moneys secured by the said judgment bond, or give further time for the payment thereof, or that the collection of the same should be deferred or postponed for the period of one year, or any other time, in consideration of the promise to pay to him the sum of forty-five dollars or any other

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sum of money whatever; and also denies that the said sum of forty-five dollars or any other sum was ever paid to him in pursuance of any such pretended understanding and agreement between the said Isaac D. Hamilton and himself respecting further time for the payment of the moneys secured by the said bond.

Edward Ridgely and *James L. Wolcott* for the complainant.

N. B. Smithers and *George V. Massey* for the defendant.

THE CHANCELLOR.—No interrogatories were annexed to or accompanied the bill of complaint. The answer of the defendant was not required to be under oath; and although it was in fact made under oath, under our rules of court it cannot be used as evidence in behalf of the defendant. If it contains any admissions of facts, those admissions may be used against the party making them.

Except for our rule of court on this subject, the answer of Jerman, being responsive to the statements of the bill, would be evidence for him; and it would be necessary to overcome that answer by the testimony of two witnesses, or the testimony of one witness and such strong corroborating circumstances as would in effect amount to the testimony of an additional witness. Such being our rule of court, I must therefore in the decision of this case be governed solely by the testimony in the cause.

Isaac D. Hamilton has been examined as a witness on behalf of the complainant, and his testimony fully sustains the allegations of the bill. He has not been discredited as a witness, and I am therefore compelled to decree in favor of the complainant, and order that a perpetual injunction issue as prayed by the bill.

Let a decree be drawn accordingly.

Syllabus.—Statement.

JOHN H. HOFFECKER, Administrator *c. t. a.* of HORACE
DRYDEN CLARK, Deceased,

vs.

HORACE CLARK, DRYDEN O. CLARK, MARY M. CLARK,
and WALTER F. CLARK.

Kent, March T. 1888.

Will; construction; sale to pay debts.

1. A will construed and held to create a trust as to certain bank and municipal stocks, and the administrator *cum testamento anexo* instructed to assign such stocks to the persons who may be appointed trustees in the place of those named in the will, who had declined to serve.
2. The personal property designated by the will for the payment of debts and expenses, and that not specifically devised being insufficient for the purpose, the administrator *cum testamento anexo* is ordered to sell so much of certain bank stock devised in trust for testator's children as may be necessary for payment of debts and expenses.

BILL FILED BY THE COMPLAINANT FOR INSTRUCTIONS AS TO HIS DUTY UNDER THE WILL OF THE DECEDENT.—The bill in this case states that Horace Dryden Clark, late of the town of Smyrna, in Kent County, deceased, made and published his last will and testament on the seventeenth day of April, A. D. 1886, which was, after his death, duly admitted to probate in the proper office at Dover; that Horace Clark, one of the defendants, and James Tasker, of Montreal, in the Dominion of Canada, were nominated as executors of said will, but severally renounced such executorship, and thereupon letters of administration with the will annexed were in due form granted unto John H. Hoffecker, the said complainant.

That, *inter alia*, the said testator was possessed of

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three hundred and fifty-five (355) shares of the public fund of the city of Montreal of the par value of one hundred dollars (\$100) per share; also of one hundred and ninety-six (196) shares of the capital stock of the Bank of Montreal, of the par value of two hundred dollars (\$200) per share; and also of two hundred and fifty shares of the Canadian Bank of Commerce at Toronto, of the par value of fifty dollars per share; that as to the said securities the said testator made the following provisions in his will, to wit:

“I give, devise, and bequeath to my daughter Mary, during her natural life, one third of the interest and dividends on all my stock in the Bank of Montreal and all the 4 per-cent stock against the city of Montreal, and after her death one third of the stock itself I give to her children.

“I give to my son, Walter, during his life, one third of the interest and dividends on all my stock in the bank of Montreal, and all the 4 per-cent stock against the city of Montreal, and after his death I give one third of the stock to his children.

“I give to my son Dryden one third of the interest and dividends on all my stock in the Bank of Montreal and all the stock against the city of Montreal, and after his death I give one third of the stock itself to his children.

“In case of the death of either one or two of said named Mary, Walter, or Dryden without children living, then the survivors or survivor, as the case may be, shall have all of said city and bank stocks, and, in the event that none of said three children shall leave any issue living, the said son Horace shall have said stock, if he is alive, but if not alive his children shall have it. Neither of said children Dryden, Mary, nor Walter shall have power to hypothecate or mortgage, incumber, sell, or place any lien upon any dividends, or any bonuses on the

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stock of the Bank of Montreal nor stock of the city of Montreal or interest or stock against the city of Montreal.

"I give all my stock in Canadian Bank of Commerce at Toronto to my executors or administrators in trust in four equal parts for my said children, Mary, Dryden, Walter and Horace, except fifty dollars a year shall be taken from the dividends and paid to William H. Clark, commencing on the first day of January after my decease and to continue for five years, if said William lives so long after my decease, but if said William dies sooner than five years after my decease then said payment of fifty dollars per year shall cease. After the lapse of five years, or upon the sooner death of said William, said trust shall end and said Bank of Commerce stock shall go absolutely and without limitation in four equal shares to my said four children, Mary, Dryden, Walter, and Horace.

"The above bequest of said William shall be in lieu and satisfaction of all claims whatsoever he may attempt to set up against me or my estate."

That the said testator specifically bequeathed all the personal securities constituting his personal estate, except a very insignificant part thereof, and subsequently in his said will made the following provision: "All the personal property that I own or have any interest in not given away or disposed of in some part of this will, I give to my three youngest children, Dryden, Mary and Walter, which shall be a fund in the executor's hands to pay any just claims against me, to defray the expenses of administration, funeral expenses, and charges."

That subsequently in the said will the testator did provide as follows: "I appoint William Doran, of Montreal, trustee for my son Dryden; I appoint George W. Stevens, of Montreal, trustee for my daughter Mary; and I appoint Thomas Workman, of Montreal, trustee for my

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son Walter." That each of the said persons so designated as trustees have declined to accept the said trusts and have formally renounced the same. That the personal estate, other than that so specifically disposed of, is wholly insufficient for the payment of the debts and expenses of administering the estate.

Prayers are: (1) answer; (2) that the complainant may be fully instructed and directed as to his duties under said will and as to the manner of their execution; (3) general relief; (4) subpoena.

The answer of all the defendants admits the truth of the allegations contained in the bill.

George V. Massey and *N. B. Smithers*, for the complainants.

James Pennewill, for the defendants.

THE CHANCELLOR.—A trust is created by the will of Horace Dryden Clark as to the stock in the Bank of Montreal and the 4 per-cent stock of the city of Montreal, by the said will bequeathed; and I instruct and direct the complainant to assign the said stocks to such person or persons as may be hereafter duly constituted and appointed trustee or trustees in the room and stead of the several persons named in the said will as trustees who have heretofore renounced and declined to assume the said trusts; and I also direct the complainant to sell so much of the stock of the Canadian Bank of Commerce, bequeathed by the said will, as shall be necessary to pay the debts and expenses connected with the administration of the said estate (after applying such funds of the estate not otherwise disposed of as remain in his hands), and also the costs and expenses incident to this proceeding.

Syllabus.

SIDNEY B. MASON, Trustee,

vs.

JOSEPH H. BAILY *et al.*

New Castle, March T. 1888.

*Wills; devise to "heir," "right heir," "heir at law;"
who take.*

1. If a devise be made to the "heir," "right heir," "heir at law," of a testator, and there be a person when the disposition of the will takes effect who answers that description, no other person can take, unless by plain declaration in other parts of the will the testator intends that some other person shall take, and sufficiently identifies him.
2. This is the rule also, where the devise is made to the heir, right heir, heir at law, of another person by a testator.
3. A bequest of personalty to the right heirs or to the heirs at law of an individual *prima facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger.
4. If a gift be made to one for life, with remainder to his right heirs, the heir in the strict sense is entitled.
5. If a bequest of personal property is made to A, to receive the income, dividends, and profits, and to pay over the same to B for her life and immediately after the death of B to assign and pay over the principal sum to the right heirs of B—the right heirs of B alone can take, to the exclusion of the husband of B—and to the exclusion of the administrator of B.
6. The right heir of a person deceased is he of the blood of such deceased upon whom the law casts the inheritance.
7. A husband is not the right heir of his deceased wife, in the strict and primary sense of that term.
8. An administrator is not a right heir, in the strict and primary meaning of that term, of a person dying intestate.

Statement.—Argument for defendants.

BILL FOR THE CONSTRUCTION OF A WILL.—The facts of the case and the material portions of the will in question are set forth in the opinion.

W. C. Spruance and *Charles M. Curtis*, for Arthur H. Grimshaw, one of the defendants:

By the purchase of a burial lot in a cemetery, the lot holder acquires no interest or estate in the land, but acquires only a license or privilege to make interment and erect monuments, etc. *Kincaid's Appeal*, 66 Pa. 411; *People v. St. Patrick's Cathedral*, 21 Hun, 184; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503; *Partridge v. First Independent Church*, 39 Md. 631.

Nor will a lot holder acquire any interest in the soil, although the certificate given him by the cemetery company styles him as "proprietor," and although it purport on its face to be a conveyance to him and his heirs forever. *Partridge v. First Independent Church*, *supra*; *Richards v. Northwest Protestant Dutch Church*, 32 Barb. 42.

Such a right is neither land, tenement, nor hereditament. *Ibid.*

The right of burial is not an estate, but a contract privilege. *Craig v. First Presby. Church*, 88 Pa. 42, 54.

The privilege of burial comes to the family of the deceased lot holder, not as property or by virtue of any principles of law applicable to descent of the property of a dead person, but because such was the contract between the lot holder and cemetery company; viz., that a burial place should be secured for the lot holder and his family. *Cases, supra*. Therefore the trust fund consisted of personalty alone.

Whether the gift be original or substitutional, a bequest of personal property to the "heirs of A" is a gift

Argument for defendants.

to those who would be entitled to personal estate under the Statute of Distributions. *Houghton v. Kendall*, 7 Allen, 76; *Scudder v. Vanarsdale*, 2 Beas. 109; *Welsh v. Crater*, 32 N. J. Eq. 177; *Ferguson v. Stuart*, 14 Ohio, 140; *Corbitt v. Corbitt*, 1 Jones, Eq. 117; *Nelson v. Blue*, 63 N. C. 660; *Evans v. Hartlee*, 9 Rich. L. 501; *Eddings v. Long*, 10 Ala. 203; *Haschall v. Cox*, 49 Mich. 435.

In those States where the husband is, by the Statute of Distributions, entitled to succeed to the personal estate of his deceased wife in case she dies intestate, he will be entitled to a bequest to the "heirs" of his wife. *Gibbons v. Fairlamb*, 26 Pa. 218; *Sweet v. Dutton*, 109 Mass. 589; *Eby's Appeal*, 84 Pa. 241; *Richards v. Miller*, 62 Ill. 417; *Eddings v. Long*, 10 Ala. 203.

By the Statute of Distributions of Delaware, "if the intestate be a married woman at the time of her death, her husband shall be entitled to the whole of such residue." Rev. Code, chap. 89, § 32, p. 548.

In this State the husband is recognized as an "heir" of his deceased wife as to personal property, because he is as much a distributee as a child or father. 14 Del. Laws, chap. 550, § 5, Rev. Code, p. 479.

Assuming it to be a mixed fund, by the terms of the will Mrs. Grimshaw took in her lifetime, by the operation of the rule in *Shelley's Case*, an equitable estate in fee simple in so much of the fund as was real estate, and became the absolute owner of so much of the fund as was personal estate; and upon her death intestate her said equitable estate in the land descended under the intestate laws of this State, and the personalty belongs to her administrator.

This is not a rule of intention, but an inexorable rule of law which operates "notwithstanding the clearest indication of the intention of the donor to the contrary." *Jordan v. Adams*, 9 C. B. N. S. 497.

Argument for defendants.

The rule was recognized and declared to be the law in *Griffith v. Derringer*, 5 Harrington, 284.

The rule also applies to a bequest of personal property with similar words, indicating an intention to vest in the first taker a life estate, with a remainder to his heirs. *Elton v. Eason*, 19 Ves. Jr. 78; *Williams v. Lewis*, 6 H. L. Cas. 10, 13; *Coon v. Rice*, 7 Ired. L. 217; *Horne v. Lyeth*, 4 Harr. & J. 431.

The rule in *Shelley's Case* applies to equitable as well as legal estates; but the estate of the ancestor and the limitation to the heirs must be of the same quality, *i. e.*, both legal or both equitable. 2 Jarm. Wills, 335 *et seq.*

The Statute of Uses does not apply where the trustee is invested with any active duty. *Barker v. Greenwood*, 4 Mees. & W. 429; *Ware v. Richardson*, 3 Md. 508.

Courts will always, if possible, vest the legal estate in the trustee, in cases where the beneficiary is a married woman, so that the Statute of Uses will not convey the legal estate to her and so bring the estate within the control of her husband. *Ware v. Richardson*, 3 Md. 505; *Bowen v. Chase*, 94 U. S. 812, 24 L. ed. 184; *Harton v. Harton*, 7 T. R. 652.

The trust for the use of a married woman requires the legal estate to be in the trustee throughout, *i. e.*, both during the life estate and the estate in remainder. *Harton v. Harton*, *supra*; *Brown v. Whiteway*, 8 Hare, 145.

Applying either or both of these rules to this case, the legal estate would vest throughout in the trustee, and Mrs. Grimshaw would take an equitable life estate followed by an equitable limitation to her heirs in remainder, which would vest in her an equitable estate in fee simple.

A trust "to convey" is an active, special trust, which requires that the legal estate should vest in the trustee.

Argument for defendants.

Shelley v. Edlin, 4 Ad. & El. 582; *Barker v. Greenwood*, 4 Mees. & W. 429; *Garth v. Baldwin*, 2 Ves. Sr. 646; *Booth v. Field*, 2 Barn. & Ad. 564; *Noble v. Bolton*, 11 Ad. & El. 188; *Sears v. Russell*, 8 Gray, 89; *Ware v. Richardson*, 3 Md. 505; *Kirkland v. Cox*, 94 Ill. 400.

A trust for one for life, with remainder to such persons as the life tenant should by will appoint, is such an active trust as requires that the legal estate should vest in the trustee throughout. *Doe v. Hicks*, 7 T. R. 433; *Brown v. Whiteway*, 8 Hare, 145; *Shelley v. Edlin*, *supra*.

The Statute of Uses in force in Delaware is as follows: the legal estate shall accompany the use and pass with it. Rev. Code, p. 500.

The courts have, to some extent, applied to trusts of personalty the rule applicable to trusts of realty, and have held that the statute transferred the use into possession. Yet if the trust be an active trust, the statute does not apply. *Harley v. Platts*, 6 Rich. L. 310-315; *Denton v. Denton*, 17 Md. 403.

The same rule of law must be applied to realty and personalty when in a given case they are given together by a general gift of residue. *Elton v. Eason*, 19 Ves. Jr. 73; *King v. Beck*, 12 Ohio, 390; *Aker v. Aker*, 23 N. J. Eq. 26; *Cockins' Appeal*, 1 Cent. Rep. 890, 111 Pa. 26.

In such case when the rule in *Shelley's Case* applies the absolute interest in the personalty goes to the life tenant, and at his death intestate his administrator will be absolutely entitled. *Elton v. Eason*, and *King v. Beck*, *supra*.

By the law in relation to the property of married women in Delaware, Dr. Grimshaw is entitled to one half of all his wife's real estate for his life. 15 Del. Laws, chap. 550, § 5, passed April 9, 1873.

Argument for defendants.

In construing the words of the trust "to convey to the right heirs of the said Ann Elizabeth Grimshaw, their heirs and assigns forever," the words "their heirs and assigns forever" are to be regarded as superfluous.

Superadded words of limitation are not sufficient to convert words of limitation to which they are added into words of purchase. 2 Jarm. Wills; *Physick's Appeal*, 50 Pa. 128; *Nice's Appeal*, Id. 143.

The intervention of the power did not affect the operation of the rule; and since the power was not exercised it is as if it had not been inserted at all. *Brown v. Whiteway*, 8 Hare, 145; *Physick's Appeal*, *supra*; *Doe v. Martin*, 4 T. R. 64; *Brown v. Renshaw*, 57 Md. 67.

Willard Saulsbury, Jr., for Joseph H. Baily, Edith B. Value, Sidney B. Mason, and Henry B. Nones, guardian *ad litem* of James E. Baily, defendants:

The intention of the testator, gathered from the whole will and the circumstances under which he made it, is to govern the construction.

Even though unreasonable, the intention of the testator, if it violates no principle of law or morality, is the guide in giving effect to a will. *Den v. McMurtrie*, 15 N. J. L. 287; 4 Kent, Com. 535, 537; *Smith v. Bell*, 31 U. S. 6 Pet. 75, 8 L. ed. 325; *Welch v. Huse*, 49 Cal. 501, 509.

The words "right heirs" should have their strict technical meaning. Theob. Wills, 273; *Burges v. Thompson*, 13 R. I. 712; 4 Kent, Com. 551 note (a); 1 Co. Litt. * 503, and cases hereafter cited.

Technical words must be taken in their technical sense, in the absence of explanation on the face of the will. Wigram, First Proposition, p. 58, § 21; Id. Second Proposition, p. 66, § 24; *Clark v. Mosely*, Rich. Eq.

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396, 400-402; *Luce v. Dunham*, 69 N. Y. 39; *Mounsey v. Blamire*, 4 Russ. 384-387; *Brearley v. Brearley*, 1 Stockt. 24, 25; *Shore v. Wilson*, 9 Clark & F. 525.

This, however, is not to override the testator's intention, but to effectuate that intention. *Langham v. Sanford*, 2 Meriv. 22.

Our courts have thus taken technical words in construing wills. *Kean v. Hoffecker*, 2 Harrington, 103-116.

If from the words of a will the intention is a matter of doubt, the words must be construed according to their legal import. *Annable v. Patch*, 3 Pick. 360, 363.

Specific words in a will must have the technical effect derived from usage and sanctioned by decisions. *Hawley v. North Hampton*, 8 Mass. 3, 38, 39; *Id. v. Id.*, 5 Mass. 500; *Myers v. Eddy*, 47 Barb. 263-266.

Heirs are those of the kindred of a decedent upon whom the law casts the inheritance immediately upon his decease. *Dodge's Appeal*, 106 Pa. 220; 2 Bl. Com. 201; *Williamson v. Williamson*, 18 B. Mon. 329; *Smith v. Butcher*, L. R. 10 Ch. D. 116.

The word "heirs" must be construed in its strict technical meaning, unless the contrary intent plainly appear in the will. *Ivins' Appeal*, 106 Pa. 176; *Dodge's Appeal*, Id. 220; *Love v. Buchanan*, 40 Miss. 758; *Gold v. Judson*, 21 Conn. 616; *Rand v. Butler*, 48 Conn. 298; Leake, Property in Land, 161, 162.

It is incumbent upon those who contend that the language of the testator is not to be understood according to its natural and literal meaning to exhibit some solid and satisfactory reason why the words employed are not to be understood in their clear, plain, and literal signification. *Roddy v. Fitzgerald*, 6 H. L. Cas. 877; *Williamson v. Williamson*, 18 B. Mon. 329.

The heir will take under a bequest as *persona designa*-

Argument for defendants.

ta. *De Beauvoir v. DeBeauvoir*, 3 H. L. Cas. 524; *Mounsey v. Blamire*, 4 Russ. 384-387; *Bowers v. Porter*, 4 Pick. 209.

A bequest of personalty to the right heirs or to the heirs at law, or to the next heir of an individual, *prima facie*, goes to such heir as *persona designata* whether the bequest be to the heirs of the testator or of a stranger. Theob. Wills, 273.

Equity considers that done which should have been done. *Chamberlain v. Taylor*, 105 N. Y. 630, 7 Cent. Rep. 292; *White v. Howard*, 46 N. Y. 162.

This trust estate consists of both personal and real property, viz., the stocks and bonds and the cemetery lot, and they are sufficient in law to give to this trust estate the character of a mixed fund.

The rule that a bequest of personalty to the "right heir," or "heir at law" goes to such "heir" as *persona designata* applies *a fortiori* to a mixed fund; and in such case the heir will take all and the next of kin nothing. Theob. Wills, 273; *DeBeauvoir v. DeBeauvoir*, 3 H. L. Cas. 524; *Boydell v. Golightly*, 14 Sim. 327, 346; *Todhunter v. Thompson*, 26 Weekly Rep. 883; *Gwynne v. Muddock*, 14 Ves. Jr. 488; Roper, Leg. 93 (3). In the same way if the gift is to A for life, with remainder to his heirs, the heir in the strict sense is entitled. Theob. Wills, 273; citing *Re Dixon*, L. R. 4 Prob. D. 81; *Smith v. Butcher*, L. R. 10 Ch. D. 113.

Right heirs are those who would have taken real estate, and not those who would be entitled under the Statutes of Distribution. *Gordon v. Small*, 53 Md. 550.

The word "heir" when applied to the succession of personal estate has frequently been construed to mean "next of kin." Wigram, Wills, O'Hara's ed. 304; *Gittings v. McDermott*, 2 Mylne & K. 69, 70, 76, 78; *Vaux v. Henderson*, Jac. & W. 388, note; *Welsh v. Crater*, 32 N. J. Eq. 177; Roper, Leg. 89.

Argument for defendants.

"Next of kin" means nearest in blood relation, and excludes the husband and wife. 2 Jarm. Wills, 643; *Wright v. M. E. Church*, Hoffm. Ch. 211-213; Hawk. Wills, 97; *Tillman v. Davis*, 95 N. Y. 29, 30, 47 Am. Rep. 1; *Murdock v. Ward*, 67 N. Y. 392, 393; *Wilkins v. Ordway*, 59 N. H. 378; *McKinney v. Mellon*, 3 Houston, 278.

Neither the husband nor the wife takes as next of kin under the statute. *Garrick v. Camden*, 14 Ves. 372-376, 381-386; Theob. Wills, 276; *Boydell v. Golightly*, 14 Sim. 338, 347; *Watt v. Watt*, 3 Ves. Jr. 244; *Green v. Hudson River R. Co.* 32 Barb. 25, 28; *Drake v. Gilmore*, 52 N. Y. 389; *Bailey v. Wright*, 18 Ves. Jr. 52.

The husband and wife are not heirs or next of kin to each other, within the ordinary meaning of a will. *Ivins' Appeal*, 106 Pa. 176; 2 Kent, Com. 136; 2 Jarm. Wills, 653, 666; *Dodge's Appeal*, 106 Pa. 216; *Luce v. Dunham*, 69 N. Y. 36-45.

The power of appointment in the wife did not in any sense vest the property in her. *Field v. Hitchcock*, 17 Pick. 182, 183; *Grosvenor v. Bowen*, 15 R. I. 549, 4 New Eng. Rep. 760, 761; 2 Kent, Com. 324; *Westcott v. Cady*, 5 Johns. Ch. 334.

Personal property may be limited over after a bequest for life by way of executory bequest. *Pepper v. Warrington*, 4 Harrington, 55.

Where a will is capable of two interpretations that one should be adopted which prefers those of the blood of the testator to strangers. *Wood v. Mitcham*, 92 N. Y. 375, 379; *Scott v. Guernsey*, 48 N. Y. 106.

Where the intention of the testator is doubtful the motive has an important bearing. *Hilliard v. Kearney*, 1 Busb. Eq. 221; *Smith v. Bell*, 31 U. S. 6 Pet. 75, 77, 8 L. ed. 325, 326.

The law favors that construction of a will which will

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not tend to disinherit the heirs, unless the intention to do so is most clearly expressed. *Scott v. Guernsey*, 48 N. Y. 121; *Rupp v. Eberly*, 79 Pa. 141; *Bender v. Dietrick*, 7 Watts & S. 284; *Wright v. Hicks*, 12 Ga. 155; *Howard v. American P. Soc.* 49 Me. 288; *Hitchcock v. Hitchcock*, 35 Pa. 393, 400; *Hayden v. Stoughton*, 5 Pick. 528, 536; *Schauber v. Jackson*, 2 Wend. 13; *French v. M'Ihenny*, 2 Binn. 13.

Courts will not permit a single uncertain cause to defeat the general intent of the testator. *Baxter v. Baxter*, 122 Mass. 87; *Smith v. Bell*, *supra*.

The property never being vested in Mrs. Grimshaw, in whole or in part, the marital rights of Dr. Grimshaw cannot attach; neither can he claim any part of it as her administrator or in any way under our Statute of Distributions.

THE CHANCELLOR.—By his will, dated February 6, 1869, Joseph T. Baily, after providing for the payment of his debts and funeral expenses and the expenditure of \$500 by his executors in the construction of the family vault, disposed of the rest, residue, and remainder of his estate, real, personal, and mixed, whatsoever and wheresoever the same might be, into six equal parts.

The particular clause of the will under which the contention in this cause arises is as follows: "Another equal one-sixth part thereof I give, bequeath, and devise unto Sidney B. Mason, in trust to pay the income, dividends, and rents accruing thereto (after deducting all reasonable expenses) to her sister, my daughter Ann Elizabeth Grimshaw, for and during the term of her natural life; and immediately after the decease of the said Ann Elizabeth Grimshaw, then to convey the said equal one-sixth part thereof according to the order and direction of the last will and testament of the said Ann Elizabeth Grimshaw

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or according to the order and direction of an instrument in the nature of the last will and testament executed by the said Ann Elizabeth Grimshaw, in the presence of at least two witnesses, and on the failure of such last will or testament or instrument, then to convey the same to the right heirs of the said Ann Elizabeth Grimshaw, their heirs and assigns forever."

The fourth item of the will was as follows: "I authorize and empower my executors hereinafter named or the survivor of them, should it be deemed necessary, in making distribution of my estate according to this my will, to sell and convey any or all of my estate, either at public or private sale, for the best price that can be obtained, and deed or deeds in fee simple to the purchaser or purchasers thereof, or other conveyances or transfers to make, execute, and deliver."

The testator appointed Joseph T. Baily and Sidney B. Mason executors.

Letters testamentary were granted to the executors January 29, 1874.

Testator left to survive him children—both sons and daughters.

Ann Elizabeth Grimshaw, *cestui que trust*, died August 16, 1884, intestate and without issue, without having executed any instrument in the nature of a will as provided for by said will of testator, leaving to survive her her husband, Arthur H. Grimshaw, and Joseph H. Baily, a brother, and Sarah B. Mason and Edith B. Value, sisters, and James G. Baily, and B. V. Baily, nephews, all of whom are defendants.

Arthur H. Grimshaw, the husband, claims the whole trust estate as right heir of his deceased wife, and also as her administrator.

The brothers, sisters, and nephews of Mrs. Grimshaw claim the one sixth of the testator's estate, which was

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given, bequeathed, and devised to Sidney B. Mason for her as aforesaid.

There is no proof of the nature, character, and description of the property and estate of the testator, at the date of his will.

It seems, from the statement of counsel on all sides, that at the time of his death the testator owned two burial lots in Brandywine Cemetery and a considerable personal estate.

The bill in the cause is filed by the trustee for instructions as to the meaning of the will. There is nothing in the context or other parts of the will of Joseph T. Baily, the testator, to explain whom he meant by the right heirs of Ann Elizabeth Grimshaw.

The devise and bequest to her and her right heirs before recited must of course speak for itself; and we are in no respect otherwise enlightened as to its true meaning and construction.

"In the construction of devises," says Chancellor Kent (Commentaries, vol. IV., 537), "the intention of the testator is admitted to be the pole star by which the courts must steer; yet that intention is liable to be very much controlled by the application of technical rules and the superior force of technical expressions." And in a note to this remark it is said "that the rule is understood to be settled that if a devise be made to the heir, right heir, heir at law, or lawful heir of the testator, and there be a person, when the disposition of the will takes effect, who answers that description, no other person can take, unless by a plain declaration in other parts of the will the testator intends that some other person shall take, and has sufficiently identified him."

Whatever may have been the remarks said to have been made by *Lord Campbell* in respect to the hopeless confusion of English decisions upon this subject of the

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interpretation of wills, I must regard the English law as now settled as regards the devises and bequests of personal property in England to heirs at law, right heirs, or lawful heirs, by the decisions of *Smith v. Butcher*, L. R. 10 Ch. D. 113; and *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 534.

In the first of these cases, which seems to be the latest decided on the very question before me, it was decided that in the bequests of personal estate to the children of A during their lives, and on the decease of either of them his or her share of the principal to go to his or her lawful heir or heirs, "lawful heir" or "heirs" must be read literally, and not as meaning "next of kin," "executors," or "administrators" or "children."

The will before Jessel, *M. R.*, in that case, was not attested so as to pass real estate, and therefore passed personal estate. The Master of the Rolls said: "I think the words 'heir or heirs' must bear their ordinary and primary meaning. The true rule," he said, "is that laid down by *Vice-Chancellor Kindersley* in *Low v. Smith*, 2 Jur. N. S. 344, where he says, referring to *Lord St. Leonards'* decision in *De Beauvoir v. De Beauvoir*, 'There was no peculiarity in this particular question;' it was a mere application of what was the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was executed, such word must receive its ordinary and primary meaning, unless the court is satisfied that the testator intended to use it in a secondary and less proper sense."

Now he says: "That applies to all wills, and not the less so when any particular word used by a testator is a technical word and a word of art, which is less difficult to construe." He stated that he must take the words of the will as they stood; that "there is no expression which has a clearer meaning in law than the expression 'law-

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ful heirs.'” He defines these words to mean “the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seised in possession at the time of his death.” The rule in *Shelley's Case* was interposed in behalf of the defendant in that case, as it has been in this by the solicitors on behalf of Dr. Grimshaw. The Master of the Rolls said, I think very properly, that the rule in *Shelley's Case* had no application to the case before him. The only thing before him was the question whether, when a testator bequeaths personal estate to “heirs,” he means that it is to descend to the persons who can alone succeed to personal estate, and not to the persons who can succeed only to real estate. That was concluded, he said, by decisions to the contrary two or three hundred years old, which are all summed up by Lord St. Leonards in his speech in *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524. That being out of the way he concluded that there was nothing else at all to be found in the will before him. It was, he said, merely a gift of personal estate in remainder to “heirs;” and it makes no difference whether the gift is an immediate gift in possession or a gift in remainder.

Lord St. Leonards, in his speech in the House of Lords in the case of *De Beauvoir v. De Beauvoir*, said that the question was, “Who is the person to take? . . . It does not matter,” he said, “whether he is described as right heir, or whether he belongs to the class of legal right heirs, if he is the person and the only person who can take, supposing the real and personal property are to go together as a blended fund.” “The moment you ascertain that the heir at law, at the death of the testator [and of course this remark will apply where the heir at law is to take at the death of another], is the person entitled to the real estate, you ascertain at the same mo-

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ment, assuming the intention, that the same person is to take the personal estate as *persona designata*." And, further, that in all cases "(whether the gift is immediate or in remainder, whether it is of personal estate or of a mixed fund of real and personal estate) the question simply is whether there is such a description on the face of the will as amounts to a *designatio personæ*, and enables you to give to a person, not filling the character in which he would be entitled to take it by law, the property which the testator bequeathed to him." Lord St. Leonards in this case announced these principles stated by him, after an exhaustive review of the English authorities on the subject, as a result of those decisions.

In the case of *Mounsey v. Blamire*, 4 Russ. 384, where there was a pecuniary legacy given by a testatrix to her "heir," by that designation, it was held that the word was to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir at law took the legacy, to the exclusion of the next of kin. And that case was referred to with approval by the Lord Chancellor in the case of *De Beauvoir v. De Beauvoir*.

But I will not multiply the citation of English authorities. It is unnecessary to do so. The cases already cited establish the doctrine laid down by Theobald in his treatise on Wills, published since these decisions, that a bequest of personalty to the right heirs, or to the heirs at law, or to the next heir of an individual, *prima facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger; and that this rule applies *a fortiori* to a mixed fund; and that if a gift is to A for life, with remainder to his heirs, the heir in the strict sense is entitled.

The authorities in this country are conflicting, and it would be impossible to reconcile them, were I to attempt

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to do so. I shall not assume this laborious office, but shall refer briefly to some of the more prominent decisions.

In the case of *Wilkins v. Ordway*, 59 N. H. 378, it was held that the word "heirs," in its technical, common-law signification, does not embrace all who would share in the personal estate under the Statute of Distributions; and the bequest to the heirs of a deceased wife does not include her surviving husband, unless it appears from other parts of the will that such was the intention of the testator.

In this case Clark, *J.*, remarked: "The common-law doctrine of dower and curtesy originated in the fact that husband and wife are not heirs of each other. Ordinarily, technical terms are to be understood according to their legal signification, unless some evidence appears of an intention to use them in a different sense."

In *Richardson v. Martin*, 55 N. H. 45, it was held, he said, that the widow of a devisee cannot take as heir of her husband, under a clause giving certain bequests to him and his heirs, unless it is apparent from the will that the word "heirs" is not used in its ordinary sense.

Upon the authority of that case he decided that the appellant was not entitled to a share in the estate under the provisions of the will giving one half of the estate to the heirs of his wife. The judge, however, remarked that as the interpretation of a will is the ascertainment of the testator's intention, very little competent evidence may be sufficient to show that the testator used the word "heirs" in a broader sense than its legal meaning, intending to include the husband of a deceased wife or the widow of a deceased husband; and when such intention is shown by competent evidence, it is his will, however inartificially expressed; but ordinarily in the absence of evidence showing a different intention the word "heirs" will be understood as used in its legal sense.

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I gather from the argument of counsel in this case that in the State of New Hampshire the husband succeeds to the estate of his wife in the same right and quantity as the wife would succeed if he was deceased; and that the husband would therefore be one of the distributees with the children.

In *Gordon v. Small*, 53 Md. 561, it is said by the court: "If a party limits an interest or estate in trust to his heir or to the heir of another person, the proper sense and meaning of the word is not necessarily to be departed from because the subject of the donation or trust happens to be personal estate. It is perfectly competent to a party to give to his heir or heirs, by that description alone, if it sufficiently designates the party or parties intended to take, any sum of money that the donor may think proper to give, or even the whole of his personal estate."

It is simply a question as to what persons or class of persons were intended to be embraced by the description; and the rule of construction is that the terms employed should be allowed their established legal signification, unless controlled by the context of the instrument.

This subject was very fully and carefully considered by the Lord Chancellor (*Lord St. Leonards*) in the case of *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 424, whose opinion was concurred in by the other members of the court. In speaking of the result of the authorities, at page 557, he says: "As far, therefore, as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me to be uniform—to give to the words the sense which the testator himself has impressed upon them—that if he has given to the heir, though the heir would not by law be the person to take that property, he is the person who takes as *persona designata*. It

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is impossible to lay down any other rule of construction."

In this case the court admitted that there are cases in considerable number and of high authority, which hold that where the gift is to the heir or heirs by way of substitution for the original or preceding legatee or donee, the word "heirs" is construed as meaning the persons who would be entitled to take the personal estate in case of intestacy,—that is, the word "heirs" is held to mean those persons that would be entitled to the personal estate of the first donee or legatee by virtue of the Statute of Distributions if that person had died intestate, including, therefore, a widow, but not a husband,—and gave examples of such cases, and might have given many more such examples. But in this case they say: "The limitation of the estate is not by way of substitution within the meaning of the authorities; but the terms 'right heirs' are used simply to describe donees and remaindermen; and therefore the case falls directly within the principle laid down in the cases of *De Beauvoir v. De Beauvoir*, *Mounsey v. Blamire*, and *Smith v. Butcher*."

In *Dodge's Appeal*, 106 Pa. 216, the testatrix died leaving to survive her two daughters A and B and a son C. By her will she devised certain real estate to a trustee, to pay one third of its income to A, another third to B, and the remaining third to C, for the term of their natural lives respectively, and from and after their decease to vest absolutely in their heirs forever. C died intestate and without issue, leaving a widow. It was held that his share under the will passed on his decease to his sisters A and B, and not to his widow. It was also held that the technical meaning of the word "heirs" must be given to it when used in a will, unless there is the clearly expressed intent to the contrary. Sterrett, J., in delivering the opinion of the court, said: "The question thus presented by the record is, whether, under Mrs.

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Ryan's will, the portion in which her son Edward had a beneficial interest during life now goes to his widow or to his sisters. In other words, Is the widow the heir of her husband, or are the appellants his heirs, according to the true intent and meaning of the will? If the fund for distribution were personalty, the widow would perhaps be entitled to participate therein; but inasmuch as it bears the impress of realty, the one third in which Edward had an equitable life interest was given by his mother's will to his heirs forever. In the devise over, the remainder in fee to take effect immediately upon the expiration of the equitable life interests respectively, the testatrix used the technical word 'heirs' which in a will is to be understood in its legal or technical, and not in its popular, sense, unless the contrary intent is so plainly apparent that it cannot be misunderstood."

The same judge remarked that the heirs of a decedent are those of his kindred, upon whom the law immediately upon his decease casts the estate in real property; and the estate so descending to the heir is called the inheritance. He admits that at common law neither the husband nor the wife could be heir to the other. Where is the room, therefore, for the word "perhaps" in the above extract from the opinion?

The case, however, was rightly decided, and on correct principles of law, notwithstanding the use of that word.

In *Ivins' Appeal*, same volume of the same reporter, 106 Pa. 176, the syllabus of the case is as follows:

"1. Technical words appropriately used in a will must receive their technical signification, unless a contrary intent be apparent from a reading of the will.

"2. A testator gave and devised his residuary estate, consisting of personalty and realty, to trustees in trust for his daughters, for life, with a power of testamentary appointment in the daughters, and, in default of appoint-

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ment, to the children or issue of such daughters, and, in default of such will and child or children, or issue of such, then the principal to go to the heirs and next of kin of the daughters so dying, as provided by the Intestate Law of Pennsylvania,' upon the death of a daughter intestate and without issue. Held, that there being no apparent intent to the contrary, the words 'heirs' and 'next of kin' must receive their technical meaning; that the brothers and sisters of the said deceased daughter were, as such heirs and next of kin, entitled to her share of realty and personalty so limited in trust, to the exclusion of her surviving husband, who was neither her 'heir' nor 'next of kin,' within the technical sense of said limitation."

Mr. Justice Green, in announcing the opinion of the court in this case, said: "It has been so often held that when technical words are used in a will or other instrument they must have their technical meaning, unless a contrary intent appear, that it would be mere affectation of learning to cite the authorities."

Again: "There is no occasion here to give an untechnical meaning to technical words, as was done in the cases referred to in the appellant's argument, in which the word 'heirs' was held to have the same meaning as 'next of kin' or distributees or persons entitled under the intestate law."

Again, he says: "It is a canon of construction settled in many cases, that the word 'heirs' shall receive its appropriate technical sense, unless there is some language or expression which shows that it was used in the broader and more popular sense."

Again: "Whether we consider the strict meaning of technical words employed, or the clear intent of the testator as the guide in the construction of this testament, the result is the same."

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Now let us apply the principles hereinbefore stated, and the remarks of the judges announcing the opinions in the cases hereinbefore cited, to the will of Joseph T. Baily, the testator in the will before us. To what conclusion must we necessarily arrive?

Baily's will was executed in 1869. He died in 1874. It does not appear in what his estate consisted when he made his will. It appears to have consisted, when he died, of two burying lots in the Wilmington and Brandywine Cemetery, and of a large personal estate.

The will contains this provision: "I authorize and empower my executors hereinafter named or the survivors of them, should it be deemed necessary in making distribution of my estate according to this my will, to sell and convey any or all of my estate, either at public or private sale, for the best price that can be obtained and deed or deeds in fee simple to the purchaser or purchasers thereof, or other conveyances or transfers to make, execute, and deliver."

In the third item of the will he says: "And touching all the rest, residue, or remainder of my estate, *real, personal, and mixed*, whatsoever and wheresoever the same may be, I give, devise, and bequeath the same as follows:" then follows the gift, bequest, and devise hereinbefore recited "unto Sidney B. Mason, in trust to pay the income, dividends, and rents accruing thereto (after deducting all reasonable expenses) to her sister, my daughter, Ann Elizabeth Grimshaw, for and during the term of her natural life; and immediately after the decease of the said Ann Elizabeth Grimshaw, . . . then to convey the same to the right heirs of the said Ann Elizabeth Grimshaw, their heirs and assigns forever."

Now, considering the terms used by the testator, "estate, real, personal, and mixed, give, bequeath, and

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devise, sell and convey," one having no knowledge nor means of knowledge of what in fact the property of the testator consisted, in determining that question, would be necessarily forced to the conclusion that it was such as could be sold, bequeathed, devised, and conveyed; for these terms necessarily import that they were meant to be applied to existing subject-matter to which they were applicable, and to like assurances of title.

It is true that the will operates only from the death of the testator, and can apply only to such property and estates as testator had or was entitled to at the time of his death; but in construing the intention of the testator when a will is made, the terms which he uses in his will may be fairly considered in ascertaining the character of the property which was meant to be included in the will by the terms which he uses in respect thereto.

It is true that the solicitors for Grimshaw say that in *Sweet v. Dutton*, 109 Mass. 589, similar words were used in a trust deed which disposed of a trust fund consisting of personalty alone, and were not given any weight by the court in determining who were the persons who became the beneficiaries under the terms of the trust deed.

In the case of *Sweet v. Dutton*, A, by deed, gave all her property, real and personal, to a trustee, in trust to pay the income to her daughter during her life, and on her death to pay and transfer the trust property as she should by will appoint; and in default of appointment to convey and pay over the trust property to her heirs at law.

The deed provided that the trustee might change the mode of investment of any of the property, real and personal, and invest the proceeds as he might see fit—and referred to a schedule annexed as containing all the property conveyed by the deed.

This property was all personal, and the trustee made no change in the investment.

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It was held that on the death of A intestate the property went to her husband, and not to her child.

The schedule annexed to the deed contained only bonds, railroad stock, and bank stock.

Of course there was no necessity in the interpretation of that deed to refer for any purpose, for intention or otherwise, as to the property included in the trust deed, that property being specifically mentioned in the trust deed; and there was no reason why the court in determining the persons to be benefited by the trust should give any weight to the terms used as descriptive of the property, or even referring to said terms in determining who were the persons who became the beneficiaries under the terms of the trust deed, because the schedule thereto annexed clearly showed the character of the property intended by the trust deed.

My only reason for referring to the terms used in Baily's will is that the property contemplated by the testator in his will was not specifically mentioned; and that in the absence of any specific mention of the property intended to be disposed of by the will, the terms used by the testator may legitimately be referred to, with a view to ascertain his intention as to the beneficiaries under the will.

The will uses the term "her right heirs" as descriptive of the beneficiaries under the will after the death of Mrs. Grimshaw. There was no word in the testator's will as to whom he meant by the words "her right heirs," except those words themselves. These words must speak for themselves; the question in this case being what technical words mean.

It may not be amiss in this connection to notice what was said by the court in the case of *Merrill v. Preston*, 135 Mass. 454. In that case the court said: "Viewed as authority, however, *Sweet v. Dutton* [109 Mass. 589],

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it should be noticed, relied largely on *Mace v. Cushman*, 45 Me. 250, which has since been overruled in the State where it was decided (*Lord v. Bourne*, 63 Me. 368), stands almost entirely alone (see *Richardson v. Martin*, 55 N. H. 45, 47), and is hardly to be reconciled with the generally accepted rules upon the subject. There is a strong presumption in favor of giving words their natural meaning, and against reading them as if they said something else, which they are not fitted to express."

There are cases in this country where a different signification to the words "lawful heirs" has been given. Some of these cases have been cited by the solicitors on behalf of Dr. Grimshaw; thus in 1 Jones, Eq. 117, Pearson, J., said: "The word 'heirs' is not appropriate to the disposition of personal property; and when used in reference to it, it means those who take by law or under the Statute of Distributions. This is the rule when there are no other words to give it a different meaning; here, the other words fix that to be the meaning, for it is put in opposition to 'children.'"

But may not the words "heirs," "lawful heirs," "right heirs," be used as *designata persona*? If not, why not? When so used where is the inappropriateness to the disposition of personal property, more than to the disposition of real property? Such use is in respect to persons who are to take, and not in respect to property to be taken.

To say that these words mean those who take under the Statute of Distributions is to say that technical words are not to have a technical signification in the absence of any words or circumstances in or attending the execution of wills.

Judge Pearson, in speaking of lawful heirs as meaning those who take under the Statute of Distributions, says: "This is the rule when there are no other words

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to give it a different meaning," and immediately adds "here the other words fix that to be the meaning, for it is put in opposition to children."

Without the other words, which fix that to be the meaning, then the words "lawful heirs" do not necessarily mean those who take under the Statute of Distributions. And the reason of the judge does not therefore seem to be so clear as he doubtless understood it to be. How much more satisfactory is it to say that technical words shall have their appropriate technical meaning when there are no other words to give them a different meaning.

The case in 1 Jones, Equity, is one often cited in American cases by those adopting the rule of construction therein announced, and may be said to stand almost in a paternal relation to said rule. I do not assent to the rule as thus enunciated by *Judge Pearson*. The true rule is that "lawful heirs" or "right heirs" are to be construed in a technical sense, and according to their primary meaning—in the absence of any words or circumstances mentioned or expressed in wills showing that a different meaning was intended by the testator to be attached to them.

In *Nelson v. Blue*, 63 N. C. 660, the judge delivering the opinion of the court says: "In a will of personalty 'my lawful heirs' means those who at the death of the testatrix are entitled to distribution under the statute."

Is this necessarily so? The same remarks in reference to the opinion of *Judge Rodman* are applicable which I have made in reference to the opinion of *Judge Pearson*.

In the case of *Eddings v. Long*, 10 Ala. 203, Goldthwaite, J., says: "When the term 'heir' is used in connection with the personal estate only, there is no conflict in the cases that it is to receive the construction of next of kin."

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It may or may not receive such construction, according to the terms used by a testator. And while it may often receive such a construction it may not always properly have such construction; and to say that there is no conflict in the cases on this subject is to assume much injudicial exposition. What did the testator mean by the use of the term "heir?" How is his meaning to be determined? These are the important questions to be considered in the exposition of wills.

This case was not argued before the judge making the decision, and it was doubtless based upon the rule announced in 1 Jones, Equity.

Gibbons v. Fairlamb, 26 Pa. 217, has been cited in the argument of this case. The testator in that case bequeathed to his daughter E \$6,000, to be paid out of his personal estate within six months after his decease, and thereafter giving other legacies to his children, provided, that in case of the decease of any of the legatees before the expiration of the six months and before the payment of their legacies, the bequests of those so dying shall descend to and be equally divided among his or her heirs or representatives. These words "or representatives" are substitutional. "E died in the lifetime of the testator without issue. Her husband took out letters of administration on her estate; and it was held that the husband was the heir or representative of his wife, within the meaning of the will, and as such entitled to the legacy, but that the husband could not recover as her administrator, the legacy never having vested in the wife, but he might recover as the person substituted by the testator, in the event of her death. It was held in that case that the word "heir," in the description of the persons who are to take in the event of the death of the legatee, does not necessarily exclude the husband, it meaning such person as would be entitled to the money as the representative by the law of the State.

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Lewis, *C. J.*, said, *inter alia*: "As the legacy never vested in E it seems clear that her husband cannot claim it in his character of administrator. If he take it, he must do so as the person *substituted* by the testator to take in case of her death." But surely this is not a case similar to the one before me. Dr. Grimshaw, as administrator of his wife, cannot claim the one-sixth part of the testator's estate, because that one-sixth part never vested in his wife. What she was entitled to for her life, and for her life only, was the income, dividends, and rents accruing on the said one-sixth part. That one-sixth part was bequeathed and devised "unto Sidney B. Mason in trust to pay the income, dividends, and rents accruing thereto (after deducting all reasonable expenses, . . . to her sister Ann Elizabeth Grimshaw; and immediately after her decease . . . then to convey the same to the right heirs of the said Ann Elizabeth Grimshaw, their heirs and assigns forever."

The testator did not substitute the administrator of Ann Elizabeth Grimshaw as the person to take upon her death. She had no such interest as would pass to her administrator for the purposes of administration. The right heirs of Ann Elizabeth Grimshaw were substituted by the testator to take, not income dividends and rents upon her death, but the one-sixth part of his estate by conveyance from the trustee. Neither did the testator by his will substitute the representatives of his daughter Ann Elizabeth Grimshaw to take the one-sixth part, but the heirs at law of the said Ann Elizabeth Grimshaw.

In the case of *Lord v. Bourne*, 63 Me. 368, it was decided that a man's widow takes nothing under a testamentary bequest to his heirs.

The word "heir" has a technical signification. Jacob defines it to be one who succeeds by descent to lands, tenements, and hereditaments, being an estate of inheritance.

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Bouvier defines heir to be one born in lawful matrimony, who succeeds by descent, right of blood, and by act of God to lands, tenements, and hereditaments, being an estate of inheritance. None but God can make an heir.

"A bequest," says Roper on Legacies (vol. 1, chap. 2, § 3, pt. 2), "to the heirs of an individual, without addition or explanation, will belong to the next of kin."

"A devise or bequest to the next of kin vests the property in the persons (exclusive of the widow) who would take the personal estate in case of intestacy under the Statute of Distribution." 2 Jarm. Wills, 4th Am. ed. 28.

A fortiori a devise or bequest to right heirs would vest the property in the persons who are right heirs, to the exclusion of both the widow and the husband. If a widow be not of kin, neither is a husband. They are neither heirs of each other nor next of kin to each other.

In the case of *Lord v. Bourne*, the court says: "But is this term, as used in the residuary clause of the will, to be construed according to its technical meaning, or is it to receive a more enlarged signification? The general principle is that the word 'heir,' like other legal terms, when unexplained and uncontrolled by the context, must be interpreted according to its strict, technical import, in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question, in cases of intestacy. But this is only the *prima facie* construction, which may be repelled by evidence of a contrary intention of the testator." In that case the court further remarked: "There is nothing in the context of the testator's will which shows an intention to include his wife as a beneficiary under the residuary clause."

Is there anything in Baily's will which shows an intention to include the husband of his daughter as a beneficiary under his will?

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The court further remarked in *Lord v. Bourne* that the counsel for the complainant had cited *Mace v. Cushman*, 45 Me. 250, to establish his theory that the widow is a legal heir of a deceased husband; but that case, says the court, has been overruled. Being overruled, it is of no authority.

This opinion has already been extended to an unreasonable length. It was argued elaborately by solicitors on both sides. Numerous cases were cited by them respectively in support of their contentions. It would be great labor, without corresponding profit, perhaps, to review at much greater length the authorities cited. I will refer to only one other case cited in behalf of the contention of Dr. Grimshaw. That is the case of *Richards v. Miller*, 62 Ill. 417.

In this case it was decided that the rule rigidly adhered to by the courts is that the words employed by a testator in his will will be presumed to have been used in their strict and primary sense, unless the context shows them to have been used in a different sense. When not thus explained their legal and technical meaning will be enforced. Thus, the word "heirs" unexplained by the context will be held to mean the persons appointed by law to succeed to the estate in case of intestacy. This case also decides that when gifts by will to heirs at law are made to them *simpliciter*, the persons to take and the proportions must be determined by the Statute of Descent and Distribution.

It is said that an heir is one who inherits or takes from another by descent, as distinguished from a devisee who takes by will. He is one upon whom the law casts the estate immediately upon the death of the owner.

When property is devised to the testator's heirs at law without other designation, it passes as in cases of intestacy. Suppose these principles be admitted, do they

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control the meaning of the item contained in the will of Baily under review?

That item had reference to the heirs at law, not of Baily himself, but as to the persons who should take as right heirs of his daughter Ann Elizabeth Grimshaw upon her decease.

The terms of his will were such as carefully excluded her husband, although not by name, from the benefits of his will on behalf of his daughter; and he provided therein that after her decease the one-sixth part of his estate, the income, dividends, and rents of which were given to his daughter for her life to be paid to her by a trustee named by him in his will, should go to the heirs at law of the daughter.

There is nothing in the context or any part of the will to show that by the words "right heirs" of his daughter, he meant any other person or persons than those who were technically such.

Dr. Grimshaw, as his wife's administrator, certainly could not have administered upon the one-sixth part of Baily's estate, because that sixth part was not of her goods and chattels, rights and credits, and never vested in her. At her decease all her interest therein ceased and determined, and no part thereof could pass to her administrator for the purpose of administration.

He was not of kin to his wife so that he could claim in that respect. He could have no marital rights therein, because the interest of his wife did not extend beyond her decease. The expression "her right heirs," therefore in the will of Baily, her father, must, I think, be construed to be *designata persona*.

The question in this, as in every similar case, is this: Is the person described, described as *persona designata* or not? The question is, Who is the person to take? It does not matter whether he is described as right heir, or

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whether he belongs to the class of legal right heirs, if he is the person and the only person who can take, supposing the real and personal property are to go together as a blended fund. The moment you ascertain that the heir at law at the death of the testator or at the death of another is the person entitled to the real estate, you ascertain at the same moment, assuming the intention, that the same person is to take the personal estate as *persona designata*.

In all cases, whether the gift is immediate or in remainder; whether it is of personal estate or of a mixed fund of real and personal estate,—the question simply is whether there is such a description on the face of the will as amounts to a *designatio personæ* and enables you to give to a person not filling the character in which he would be entitled to take it by law the property which the testator bequeathed to him. But we are told in this case that the one-sixth part of Baily's estate under the terms of his will could not go to the right heirs of Mrs. Grimshaw, because it was personal estate and must be intended to go to her administrator.

But there was nothing to prevent Baily giving to the right heirs of Mrs. Grimshaw even by that description, if his will sufficiently designates them as the parties who were to take the one-sixth part of his estate or the whole of his personal estate.

As far, therefore, as the authorities go, with respect to personal estate, whether the gift be an immediate gift or whether it be a gift in remainder; whether it be a gift to the right heirs of the testator or to the right heirs of another,—the case appears to me beyond reasonable question rightly interpreted to give to the words the sense which the testator himself has impressed upon them,—that if he has given to the right heir, although the heir would not by law be the person to take that property, he

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is the person who takes as *persona designata*. This is, I think, the true rule of construction; and this rule of construction is supported by the case of *DeBeauvoir v. DeBeauvoir*, 3 H. L. Cas. 523.

Thus far I have said nothing in respect to the devise of the two burying lots.

This devise must be governed absolutely by the Act of Assembly of this state, granting a charter to the Wilmington & Brandywine Cemetery Company, 10 Del. Laws, 27.

It has not been contended by the solicitors for Grimshaw, if I understood their argument, that under the Act referred to these burying lots were personal property. If they were personal property, they certainly could not pass under Baily's will to the administrator of Mrs. Grimshaw.

Baily was proprietor of these two lots. He must have had some property in them, and that property must have been either real or personal.

The Act speaks of them as an estate; for it declares that the "estate of the proprietors, respectively, in their respective lots, shall be of qualified inheritance—that is to say, the same shall descend as real estate to heirs; but it shall not be levied on nor taken by execution nor any process of law or equity; and it shall not be aliened or devised so as to vest any right in the alienee or devisee without the approval of the board of directors, and that said lots shall be held subject to the constitution, by-laws, and regulations of the said corporation."

True it is that it does not appear that any approval of the devise by Baily was given to him in his lifetime, as it could not reasonably be expected to be given to him, nor to the right heirs of Mrs. Grimshaw; but Baily had a certificate of the burial lots in the usual form and attested in the usual manner, which the Act declared should be

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valid and sufficient. And the Act declares that "the record and record books that have been kept and that shall be kept under the constitution aforesaid, by the secretary, shall be competent evidence in any court of law or equity. And copies of said records and of entries in said books by the secretary shall also be competent evidence in such courts."

It appears by said books or records that a certificate as aforesaid was issued to the said Baily for the two said burial lots. While I do not think, under the authorities I have hereinbefore cited, that it is very material to determine the character of these two burial lots, inasmuch as it was perfectly competent for Baily to give personal as well as real estate to the right heirs of his daughter Mrs. Grimshaw as *designata persona*, yet the Act of Assembly declaring that these lots, and Baily's estate therein as their proprietor, shall be of qualified inheritance, although they should not be aliened or devised so as to vest any right in the alienee or devisee without the approval of the board of directors of the cemetery, and as doubtless such approval would be given if asked in the absence of any reasonable cause to the contrary, the devise of them by Baily shows that it was his intention to dispose of them as a part of his real estate, for it does not appear that he intended to die intestate in any respect; and even if they passed to his heirs at law instead of his devisees, this mistake, if any there be, could not affect either the question of his property therein or of his intention thereto, and might, if I considered it more material, have some relation more or less important to the first rule laid down by Theobald in respect to bequests of personal property to heirs, which is "that a bequest of personalty to the right heirs or to the heirs at law, or the next heir of an individual, *prima facie* goes to such heir as *persona designata*, whether the bequest

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be to the heirs of the testator or of a stranger; and this rule applies *a fortiori* to a mixed fund."

I am therefore of opinion, for the reasons hereinbefore stated, that the one equal sixth part of the rest, residue, and remainder of the estate of Joseph T. Baily which he gave, bequeathed, and devised unto Sidney B. Mason in trust to pay the income, dividends, and rents accruing thereto (after deducting all reasonable expenses) to her sister, the testator's daughter, Ann Elizabeth Grimshaw, for and during the term of her natural life, and immediately after the decease of the said Ann Elizabeth Grimshaw, to the right heirs of the said Ann Elizabeth Grimshaw, their heirs and assigns forever, passed to Joseph S. Baily, her brother, S. B. Mason, Edith B. Value, her sisters, and Joseph E. Baily and B. F. S. Baily, the defendants in this cause, and not to Arthur H. Grimshaw, the husband of said Ann Elizabeth Grimshaw, either as the right heir of his said wife or as her administrator; and that the said Sidney B. Mason, the trustee named in the said will of the said Joseph T. Baily, should now convey the same to the said brother, sisters, and nephews of the said Ann Elizabeth Grimshaw, as her right heirs, and not to the said Arthur H. Grimshaw, either as her right heir or administrator; and I so direct.

Syllabus.

DIAMOND STATE IRON COMPANY

vs.

GEORGE W. TODD, JETHRO T. McCULLOUGH and
EDWARD DARLINGTON.

New Castle, March T., 1888.

Specific performance; contracts relating to personal property; corporate stock.

1. Specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, depending upon whether the contract appears, from all the circumstances, to be equitable or not.
2. As a general rule equity will not enforce specific performance of contracts relating to personal property, unless it is apparent that failure to perform cannot be adequately redressed by damages.
3. It seems to be the established rule in this country that equity will not enforce specific performance of contracts for the sale of corporate bonds and stock.
4. To entitle a contract to be specifically enforced it must be without ambiguity and uncertainty.
5. Definiteness and certainty in reference to security for deferred payments of purchase money are as requisite to entitle a contract for the sale of personal property to specific performance as they are to a contract for the sale of real estate. *Godwin v. Collins*, 4 Houston, 28, applied.
6. The same principles are applicable to a request for specific performance when presented by interpleader as when presented by original bill for specific performance.
7. A decree for specific performance of a contract for the sale of stock in a private business corporation, evidenced by an offer in writing signed by the vendor and accepted in writing by the vendee, refused—the contract being uncertain in respect to security for deferred payments of the purchase money, and as to time of delivery of the stock and payment therefor, and showing want of deliberation, and it appearing from the evidence that

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the parties did not deal on an equality, but that the vendee, although being an officer of the corporation, had the advantage of the vendor in reference to knowledge of the real value of the stock (which was greater than the consideration stipulated in the contract); that no part of the purchase money had been paid at any time by the vendee, and no tender thereof made until some time after the making of the contract; and it not appearing that the vendee had suffered any damages or, if he had suffered any, that they could not be redressed at law.

BILL OF INTERPLEADER.—This suit was brought to determine by interpleader between George W. Todd and Jethro T. McCullough, which of them is entitled to 105 shares of the capital stock of the Diamond State Iron Company, the complainant, standing upon the books of the company as the property of the defendant McCullough, and to certain dividends thereon (and interest upon a part of the dividends) that have accrued since January, 1881. This stock was on January 10, 1882, pledged by McCullough to the defendant Darlington, to secure the payment of a promissory note for \$5,000 then loaned by Darlington to McCullough. This loan has never been repaid. Darlington still holds the certificates for the stock as a security for the payment of his loan.

The defendant Todd, by his answer, claims that he became entitled to said stock, dividends and interest by an agreement in writing for the sale of the same to him by McCullough made on September 21, 1881, and prays that McCullough be decreed to specifically perform said agreement; that McCullough and this company be decreed to pay to Todd all the dividends, and interest; that the pledge of the stock by McCullough to Darlington be declared void, but if not, then that the debt of \$5,000 be paid out of the purchase money, and the stock discharged from the pledge.

The defendant McCullough by his answer resists the specific performance of the agreement of September 21,

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1881, and prays for its cancellation, on the ground that it was obtained from him by Todd, by fraud and concealment, and that it is uncertain, incomplete, hard, and unconscionable.

The facts are further stated in the opinion.

W. C. Spruance and *Chas. M. Curtis*, for defendant Todd:

I. This court has jurisdiction in this proceeding to decree specific performance of a contract for a sale of shares of stock of a private corporation. *Angell v. Hadden*, 16 Ves. Jr. 202; *Atkinson v. Manks*, 1 Cow. 691; *Webster v. McDaniel*, 2 Del. Ch. 297; *Hastings v. Cropper*, 3 Del. Ch. 165.

It is now too late to raise the objection that because the subject-matter is personal property, this court has not jurisdiction to enforce this contract of sale specifically. *Clark v. Flint*, 22 Pick. 231; *Frue v. Houghton*, 6 Col. 318; *Cutting v. Dana*, 10 C. E. Green, 265, 273.

A court of equity has jurisdiction to decree specific performance of a contract concerning either real or personal property or choses in action, where the assessment of damages in an action at law for breach of the contract is either impracticable, or the damages would be so uncertain and conjectural as to be inadequate. *Satterthwait v. Marshall*, 4 Del. Ch. 337.

The general principle is applied to contracts for assignment of debts (*Cutting v. Dana*, 25 N. J. Eq. 265; *Adderley v. Dixon*, 1 Sim. & Stu. 607); to contracts for the purchase of an annuity (*Clifford v. Turrell*, 1 Younge & C. 138); to contracts for assignment of patent (*Satterthwait v. Marshall*, 4 Del. Ch. 337).

It is now well settled that a contract for the sale of shares of stock will be specifically enforced where the stock is of uncertain value, and not readily obtainable in

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the market. 2 Story, Eq. Jur. § 717 *et seq.*, see also § 724 (a) and (b), 12th ed.; Morawetz, Priv. Corp. § 218; Taylor, Corp. § 790; *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

The early decisions in England decreed specific performance of contracts for the sale of stocks in railway companies, basing the decisions upon the ground of the limited number of shares, and distinguishing between them and government securities. *Duncuft v. Albrecht*, 12 Sim. 189; *Cheale v. Kenward*, 3 DeG. & J. 27. A similar rule was in the early days of railroads also applied in this country. *Todd v. Taft*, 7 Allen, 371.

The reason of the rule established in *Duncuft v. Albrecht* still applies to private manufacturing corporations which have a limited number of shares and shareholders; and contracts for sale of them are continually enforced specifically in equity. *Leach v. Fobes*, 11 Gray, 510; *Treat v. Richardson*, 47 Conn. 582; *Johnson v. Brooks*, 93 N. Y. 337; *Frue v. Houghton*, 6 Colo. 318; *Treasurer v. Commercial Coal Min. Co.* 23 Cal. 390.

II. The contract is such as a court of equity will enforce.

1. *The terms of the contract.* The place of performance was fully agreed upon by parol, before the parties to the contract separated and immediately after the contract was signed; and such parol agreement was thereby incorporated into and became a part of the original agreement. *Miles v. Roberts*, 34 N. H. 245.

2. *The parties to the contract.* There was no trust or confidential relation between the vendor and the vendee.

(a) In general, contracts by persons between whom a fiduciary relation as to certain subject-matter exists, when made concerning that subject-matter, are viewed with suspicion. But such relation will not affect any dealings between them, unconnected with the subject of the trust.

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Knight v. Majoribanks, 2 Macn. & G. 10; *Coles v. Trecothick*, 9 Ves. Jr. 246.

(b) The trust relation between shareholders and officers of a corporation is limited to matters relating to the management of the corporate business. *Carpenter v. Danforth*, 52 Barb. 581; *Deaderick v. Wilson*, 8 Baxt. 108; *Tippecanoe Co. Comrs. v. Reynolds*, 44 Ind. 509, 13 Am. L. Reg. N. S. 376.

There is no legal duty resting upon an officer or director of a corporation who buys stock of the company from a stockholder, to prove that he paid a full and fair price or that he disclosed to the seller every fact known to him, and not to the seller, material to the question of the value of the stock. Cases, *supra*.

The contract of sale is wholly free from imposition or undue advantage, and is not tainted with fraud.

Actual fraud: a. No evidence is produced of false representation of any material fact by the vendee. As to the effect of false representations see *Chancellor Bates in Maclary v. Reznor*, 3 Del. Ch. 464.

b. The vendee made no representations, true or false, of a fact relative to value, which induced the sale. Unless, therefore, it reasonably appears that the representations induced the sale, the contract will be enforced, whatever representations may have been made by the party seeking performance. *Phipps v. Buckman*, 30 Pa. 401; *Pearce v. Carter*, 3 Houst. 385; *Reznor v. Maclary*, 4 Houst. 241, 260; *Slaughter v. Gerson*, 80 U. S. 13 Wall. 379, 20 L. ed. 627; *Hepburn v. Dunlop*, 14 U. S. 1 Wheat. 179, 4 L. ed. 65.

c. A vendor has no right to rely upon representations by the vendee as to facts and circumstances affecting the contract, which are equally within the knowledge of both parties. *Davis v. Parker*, 14 Allen, 94; *White v. McGannon*, 29 Gratt. 511; *Maclary v. Reznor*, 3 Del. Ch.

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464; *Pearce v. Carter*, 3 Houst. 385; *Slaughter v. Gerson*, 80 U. S. 13 Wall. 379, 20 L. ed. 627; *Phipps v. Buckman*, 30 Pa. 401.

d. In negotiating a contract of sale the vendor and vendee treat at arms' length; and the buyer is not even bound to disclose facts within his exclusive knowledge as to the value of the thing bargained for. *Laidlow v. Organ*, 15 U. S. 2 Wheat. 195, 4 L. ed. 218; *Fox v. Mackreth*, 2 Bro. Ch. 420; *Phipps v. Buckman*, 30 Pa. 401; *Carpenter v. Danforth*, 52 Barb. 582; *Tippecanoe Co. Comrs. v. Reynolds*, 44 Ind. 509, 13 Am. L. Reg. N. S. 376; *Conover v. Wardell*, 7 C. E. Green, 498; *Galloway v. Barr*, 12 Ohio, 354.

Constructive fraud. See cases *supra*.

3. *Inadequacy of consideration.* The authorities are conclusive that the question of adequacy or inadequacy of price must be judged of at the time the contract is made. *Coles v. Trecothick*, 9 Ves. Jr. 234; *Low v. Treadwell*, 12 Me. 44; *Falls v. Carpenter*, 1 Dev. & B. Eq. 237; *Galloway v. Barr*, 12 Ohio, 354; *Young v. Wright*, 4 Wis. 144; *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501; *Lee v. Kirby*, 104 Mass. 420; *Hale v. Wilkinson*, 21 Gratt. 75; *Brewer v. Herbert*, 30 Md. 301; *Cochran v. Pascault*, 54 Md. 1.

Mere inadequacy of price at the time the contract of sale was made is not a sufficient objection to a decree of specific performance of the contract. Pom. Spec. Perf. 193, 194; 1 Sugd. Vend. & P. *212; *Western v. Russell*, 3 Ves. & B. 187; *Coles v. Trecothick*, 9 Ves. Jr. 246; *Seymour v. Delancey*, 3 Cow. 445; *Lee v. Kirby*, and *Cochran v. Pascault*, *supra*; *Viele v. Troy & B. R. Co.* 21 Barb. 381; *Shepherd v. Bevin*, 9 Gill, 32; *Plunkett v. Dillon*, 4 Houst. 338, 411.

In courts of equity subsequent increase in price is not considered a hardship, or as making the contracts inequi-

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table. *Falls v. Carpenter*, 1 Dev. & B. Eq. 237; *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501; *Low v. Treadwell*, 12 Me. 441; *Powers v. Mayo*, 97 Mass. 180.

III. The strict rules adopted by courts of equity in other cases will not be applied in settling legal rights of several defendants by a decree in an interpleader suit:

(1) Because the rights to be settled are rights at law. 2 Story, Eq. §§ 808, 822; *Langston v. Boylston*, 2 Ves. Jr. 107; *Webster v. McDaniel*, 2 Del. Ch. 297; *Hastings v. Cropper*, 3 Del. Ch. 165; *Cady v. Potter*, 55 Barb. 463.

(2) Because neither of the defendants is in the position of complainant.

(3) The submission of all the defendants to have their legal rights determined by this court makes it necessary that it should settle their conflicting claims.

(4) Inadequacy of price, to be a ground of rescission and cancellation of an unexecuted agreement, must be so gross as to be conclusive evidence of fraud. *Osgood v. Franklin*, 2 Johns. Ch. 1.

IV. The defendant Todd has in legal effect fully performed his part of the contract. The strict common-law rule as to the character of a tender does not prevail in equity; and if the vendor has openly refused to perform the vendee need not make a tender or demand; it is enough that he is ready and willing, and offers to perform in his pleading. *Pleasanton v. Raughley*, 3 Del. Ch. 124; *Hunter v. Daniel*, 4 Hare, 420, 433; *Brock v. Hidy*, 13 Ohio St. 306, 310; *Maxwell v. Pittenger*, 2 H. W. Green, 156; *Bass v. Gilliland*, 5 Ala. 761; *Wilkins v. Evans*, 1 Del. Ch. 156; 3 Pom. Eq. Jur. § 1407, n. 1; Pom. Spec. Perf. §§ 326, 361; *Tracey v. Irwin*, 85 U. S. 18 Wall. 549, 21 L. ed. 786; *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501; *Kerr v. Purdy*, 50 Barb. 24; *Crary v. Smith*, 2 N. Y. 60.

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V. The defendant McCullough is not entitled to have decreed to him interest upon the purchase money, having refused to accept it when tendered him. *Davis v. Parker*, 14 Allen, 94; *Bass v. Gilliland*, 5 Ala. 761.

Anthony Higgins and *J. H. Hoffecker, Jr.*, for defendants McCullough and Darlington:

Specific performance of the alleged contract of sale should be refused.

To decree the specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances. *Hudson v. Layton*, 5 Harrington, 74; *Godwin v. Collins*, 3 Del. Ch. 189, 4 Houston, 28; *Seymour v. Delancey*, 6 Johns. Ch. 225.

Specific performance of this contract will not be decreed, because the contract is imperfect. *Godwin v. Collins*, 4 Houston, 55, per Gilpin, *C. J.*, and cases cited, *Hudson v. Layton*, 5 Harrington, 74, 90.

The contract makes no provision for the delivery of the stock and the amount standing to the credit of McCullough of the surplus fund, or when it should be delivered to Todd.

The agreement makes no provision for the payment of the interest on the balance of \$7,500 or when it should be payable. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 275; *Colson v. Thompson*, 15 U. S. 2 Wheat. 341 (see note, 4 L. ed. 255); *Abeel v. Radcliff*, 13 Johns. 297; *Hammer v. McEldowney*, 46 Pa. 336.

Todd now offers to pay cash for the stock, and accept an immediate delivery of it, but the court will not alter the terms of the contract, in order to enforce it. *Godwin v. Collins*, 4 Houston, 60; *Ormond v. Anderson*, 2 Ball & B. 369.

Mere inadequacy of price independent of other circum-

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stances, where it is such as shocks the conscience and amounts, in itself, to satisfactory evidence of fraud, is ground not only for refusing specific performance, but also for rescinding the contract. Pom. Spec. Perf. 193, 194; Fry, Spec. Perf. 422-424; *Wiest v. Garman*, 4 Houston, 119; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Coles v. Trecothick*, 9 Ves. Jr. 246.

Inadequacy of consideration, when combined with unfairness of any kind, misrepresentation, concealment, or studied suppression of the true value of the property, mistake, or even with ignorance, will induce a court to deny specific performance. Fry, Spec. Perf. 420; Pom. Spec. Perf. 196; *Deane v. Rastron*, 1 Anstr. 64; *Falcke v. Gray*, 4 Drew. 660; *Cockrell v. Taylor*, 15 Beav. 103, 115; *Godwin v. Collins*, 3 Del. Ch. 189.

The court will not enforce the agreement, because it was entered into by McCullough under ignorance and mistake as to certain material facts. 2 Pom. Eq. Jur. 860, 868; Pom. Spec. Perf. 243 *et seq.*; *Gillespie v. Moon*, 2 Johns. Ch. 585.

This rule specially applies where the defendant, against whom a specific performance is asked, has fallen into a mistake which the plaintiff by his acts or omissions, either intentionally or unintentionally, induced or made probable or even possible, or to which the plaintiff contributed. Pom. Spec. Perf. 244; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Denny v. Hancock*, L. R. 6 Ch. App. Cas. 1; *Philips v. Homfray*, Id. 770; *Baskcomb v. Beckwith*, L. R. 8 Eq. 100; *Higginson v. Clowes*, 15 Ves. Jr. 516; *Webster v. Cecil*, 30 Beav. 62; *Mason v. Armitage*, 13 Ves. Jr. 25, 38; *Clowes v. Higginson*, 1 Ves. & B. 524; *Doggett v. Emerson*, 3 Story, 700; *Rider v. Powell*, 28 N. Y. 310; *Mathews v. Terwilliger*, 3 Barb. 50.

It is not necessary that the defendant's error should to any extent be referable to the conduct of the other party.

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A mistake which is entirely his own act or omission or that of his agent, and for which the plaintiff is not in the least responsible, will defeat the relief of specific performance. Pom. Spec. Perf. 245; *Ball v. Stowe*, 1 Sim. & Stu. 210; *Malins v. Freeman*, 2 Keen, 25; *Manser v. Back*, 6 Hare, 443; *Leslie v. Thompson*, 9 Hare, 268; *Baxendale v. Seale*, 19 Beav. 601; *Western R. Corp. v. Babcock*, 6 Met. 346; *Post v. Leet*, 8 Paige, 337.

Specific performance of a contract will not be enforced where the defendant has contracted under a mistake to which the plaintiff has by his acts even unintentionally contributed. *Baskcomb v. Beckwith*, L. R. 8 Eq. 100; *Phillips v. Homfray*, L. R. 6 Ch. App. Cas. 770.

The court will not specifically enforce this contract, because it was induced by the misrepresentations of Todd to McCullough. *Simar v. Canaday*, 53 N. Y. 306; *Stebbins v. Eddy*, 4 Mason, 414, 423; *McClellan v. Scott*, 24 Wis. 81; *Medbury v. Watson*, 6 Met. 260; *Manning v. Albee*, 11 Allen, 522; *Ellis v. Andrews*, 56 N. Y. 87.

Where the representation is definite, affecting the value of the subject-matter or otherwise inducing the party addressed to enter into the contract, and it turns out to be untrue—whether actually known to be untrue by the one making it is immaterial,—the party misled, especially if he had no means of ascertaining the truth of the statements, can on this account successfully resist a specific performance. Pom. Spec. Perf. 219, note 1, citing *Brooke v. Rounthwaite*, 5 Hare, 298; *Stewart v. Alliston*, 1 Meriv. 26; *Price v. Macaulay*, 2 DeG. M. & G. 439; *Farebrother v. Gibson*, 1 DeG. & J. 602; *Best v. Stow*, 2 Sandf. Ch. 298; *Harris v. Kemble*, 2 Dow. & C. 463; *Rawlins v. Wickham*, 3 De G. & J. 304; *Boynton v. Hazelboom*, 14 Allen, 107; *Fisher v. Worrall*, 5 Watts & S. 483.

To be entitled to a specific performance, a party mak-

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ing a statement as true for the purpose of influencing the conduct of the other party is bound to know that it is true. Pom. Spec. Perf. 217; *Ainslie v. Medlycott*, 9 Ves. Jr. 13, 21; *Wall v. Stubbs*, 1 Madd. 80; *Powell v. Elliot*, L. R. 10 Ch. App. Cas. 424; *Harnett v. Baker*, L. R. 20 Eq. 50; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; *Leyland v. Illingworth*, 2 DeG. F. & J. 248; *Dyer v. Hargrave*, 10 Ves. Jr. 505; *Holmes' Appeal*, 77 Pa. 50; *Swimm v. Bush*, 23 Mich. 99.

Misrepresentation and concealment of material facts with respect to the value of the thing sold, made by the vendee during the negotiation, and preventing, or naturally tending to prevent, investigation or inquiry by the vendor, himself personally unacquainted with the property, while the purchaser has full knowledge respecting it, will prevent the vendee from obtaining a decree for a specific performance against the vendor. *Fisher v. Worrall*, 5 Watts & S. 483; *Swimm v. Bush*, 23 Mich. 99; *Holmes' Appeal*, *supra*; *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. App. Cas. 100; *Boynton v. Hazelboom*, 14 Allen, 107; *Best v. Stow*, 2 Sandf. Ch. 298.

The mere existence of opportunities for examination, or sources of information, is not enough to create constructive notice, or to put the party upon inquiry. Pom. Spec. Perf. 224; *Drysdale v. Mace*, 2 Sm. & G. 225; *Price v. Macaulay*, 2 DeG. M. & G. 346; *Wilson v. Short*, 6 Hare, 379.

The defendant Todd, as secretary, officer, and agent of the company, stood toward the company, its stockholders (and defendant McCullough as a stockholder) in a fiduciary relation. He was a trustee for the stockholders. Perry, Tr. § 206; Story, Ag. § 211. The principle applies to directors of corporations. *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 589, 23 L. ed. 328, 330; *War-*

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dell v. Union Pac. R. Co. 103 U. S. 651, 26 L. ed. 509; *Bent v. Priest*, 1 West. Rep. 749, 86 Mo. 475; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 22 L. ed. 492; *Drury v. Cross*, 74 U. S. 7 Wall. 299, 19 L. ed. 40. The same principle has been applied to the case of a paid manager or servant of a bank who was not a director. *General Exchange Bank v. Horner*, L. R. 9 Eq. 488; *Traer v. Clews*, 115 U. S. 528, 534, 29 L. ed. 467, 469; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Muddeford v. Anstwick*, 1 Sim. 89.

Equity prohibits a purchase by parties placed in a situation of trust or confidence with respect to the subject of the purchase. *Holt v. Holt*, 1 Ch. Cas. 190; *Dickenson v. Codwise*, and *Cram v. Mitchell*, 1 Sandf. Ch. 226, 256; *Greenlaw v. King*, 3 Beav. 49; *Torrey v. Bank of Orleans*, 9 Paige, 649, 663.

Misdescription consisting of omitting material particulars, however free of wrongful intent, has often been held a sufficient defense to suits for specific enforcement. 2 Pom. Eq. Jur. § 905 (1); *Shirley v. Stratton*, 1 Bro. Ch. 440; *Deane v. Rastron*, 1 Anstr. 64; *Ellard v. Llandaff*, 1 Ball & B. 241; *Hesse v. Briant*, 6 DeG. M. & G. 623; *Muddeford v. Anstwick*, 1 Sim. 89; *Bonnett v. Sadler*, 14 Ves. Jr. 526; *Drysdale v. Mace*, 5 DeG. M. & G. 103; *Baskcomb v. Beckwith*, L. R. 8 Eq. 100; *Lucas v. James*, 7 Hare, 410; *Denny v. Hancock*, L. R. 6 Ch. App. Cas. 1; *Brooks v. Martin*, 69 U. S. 2 Wall. 82, 17 L. ed. 732; *Meeker v. Winthrop Iron Co.* 17 Fed. Rep. 48.

THE CHANCELLOR.—The complainant in this suit, a corporation existing under the laws of this State, states that there stand in the name of Jethro T. McCullough, one of the defendants in this cause, 105 shares of the capital stock of said company which were transferred to

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the said defendant on the 28th day of December, A. D. 1878, by George C. Simpson, executor of Jethro T. McCullough, deceased. That in the latter part of the year 1881, the president of the said corporation complainant was notified by the defendant George W. Todd that he had become purchaser of said stock, then and theretofore appearing in the name of the said defendant McCullough on the books of the said corporation. It appearing that McCullough having refused to assign said shares of capital stock of said company to Todd, he, Todd, gave notice to the president of the corporation that he had purchased of Jethro T. McCullough his entire interest in the company, including all his stock and the accrued dividends thereon, and all his shares of the surplus fund and the accrued interest thereon; and that, although McCullough refused to make him proper transfers thereof, he should insist upon his compliance with his contract. "Your company," he says, "is hereby notified and required to make no transfers of said stock or payments of said dividends, surplus fund, or interest, except to me or upon my order."

Subsequent to the date of said notice, McCullough, through his attorney, made a formal demand upon the complainant for the payment to the said McCullough of all dividends then and theretofore accrued upon the said 105 shares of stock, which demand, in view of the conflicting claims upon the complainant with respect to the stock, it says it was unable to comply with. A suit was afterwards instituted against the company, in the District Court of the United States by McCullough.

It appears by the bill that Edward Darlington claims an interest in said stock by way of an assignment of the same to him as collateral security for a debt. The bill prays that Todd, McCullough, and Darlington may interplead with each other with respect to their several inter-

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ests and rights in the subject-matter in dispute. A decree of interpleader was entered by consent and agreement of all the parties, complainants and defendants. It was also ordered, upon like consent and agreement, that the complainant (at or before the first day of the next ensuing term of the Court of Chancery, in and for New Castle County) pay into court the sum of \$9,149.80, being the amount in the bill mentioned as the amount of accrued dividends and interest on said stock—the said sum when so paid into court to abide the decision of the court as to the rights therein of the parties respectively.

It was also ordered by like agreement and consent that the complainant “pay into court all such other and further dividends, interests, and moneys as have accrued upon said stock since the filing of said bill, and which may hereafter accrue upon the same when and as the same shall become due and payable.”

The whole proceedings up to this stage of the cause seem to have been amicably arranged and agreed upon by the solicitors for the parties respectively, as per agreement in writing filed in the cause.

The answers of the defendants have been filed and the proofs taken. There seems to be no controversy as to the rights of Darlington, the stock having been pledged to him without notice of any controversy in respect to the same between Todd and McCullough. The question, therefore, for me to decide is to whom the stock, dividends thereon and interest on the surplus in controversy in equity belongs; or, in other words, Was the contract in respect thereto between Todd and McCullough such a contract as a court of equity will by its decree specifically enforce?

Specific performance as to contracts has been defined “the actual accomplishment of a contract by the party bound to fulfill it.” “Performance of a contract in the

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precise terms agreed upon; strict performance." This is a sufficient definition for the purposes of this case. A court of equity must interpret a contract between parties as it is made by them. It cannot make a contract for parties. It is the established rule that "a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances."

Says *Chancellor Bates*, in *Godwin v. Collins*, 4 Houston, 47: "A court of equity will not interfere to set aside a contract upon any ground short of incompetency or fraud; but when called upon to enforce a contract specifically, the court will go further and inquire whether the contract is an equitable one—such as a court of equity, seeking only to do equity, ought to enforce—not that this court will weigh nicely the relative advantages or disadvantages of a bargain fairly made; but it will consider whether, either from gross inadequacy of consideration or inequality of terms, such as shocks the common sense of justice, or from anything in the relations of the parties or in the circumstances of the contract, it is unconscientious for a party to exact his advantage. Now, as it is impossible to reduce within the limits of a legal definition or rule the various and complicated transactions which may render a contract inequitable, the court must unavoidably deal with each case upon its own circumstances. Herein, precisely, appear the nature and limits of the discretion assumed by the court for this branch of its jurisdiction, and also in what sense it is that a specific performance is said to be 'not a matter of course.' The relief lies in the discretion of the court so far, and only so far, that it must necessarily judge whether under the circumstances of the case the contract is or is not an inequitable one."

Again; the same chancellor says in the same case:

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“But, whatever be the grounds of the doctrine, the discretionary character of the jurisdiction for specific performance, the power to grant or refuse relief according to the equities of the particular case, has become settled by authority of the most eminent judges of all times.”

Without further elaboration on this point it is sufficient to refer to the opinion in the case of *Godwin v. Collins*, where this and other principles applicable to this case are satisfactorily discussed.

In order to determine whether Todd, one of the defendants, is or is not entitled to a decree in his favor, it is necessary to consider whether his contract of purchase from McCullough, of his interest in the Diamond State Iron Company, which is hereafter set out, is or is not such as a court of equity, in the exercise of a reasonable and just discretion, would enforce specifically upon a bill filed by him for that purpose. It is not material to the proper decision of this case that such a bill has not been filed. The principles which would govern a court of equity in the determination of a bill for the specific performance of the contract necessarily arises in this bill of interpleader in which the rights of the parties are to be determined.

It is a general rule that courts of equity will not interpose by decree for specific performance of contracts for the sale or delivery of goods or chattels, because compensation at law is generally adequate in such cases; yet there are exceptions to this general rule as in articles of exceptional value. Goods which have a peculiar value—as articles of curiosity, antiquity, or affection, the loss of which could not be estimated in damages—will be decreed to be delivered to the person entitled, such as family pictures, furniture, or heirlooms. So specific performance will be decreed of a contract for the delivery of chattels which no one but the defendant can supply and

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which are necessary to enable the plaintiff to fulfill an engagement with a third person, as if a man were to contract to furnish timber to a ship builder who had agreed to complete a ship by a given time, which he could not do unless the timber was supplied by the defendant; but not where the delivery of the chattels by the defendant is a mere question of convenience, nor where a decree of specific performance would enable a complainant to have the benefit of an unfair, inequitable, or unconscionable contract or agreement.

As a general rule equity will not decree for specific performance of contracts relating to personal property, for the reason that compensation in damages is ordinarily sufficient. Sometimes, however, the detention of chattels cannot adequately be redressed by damages; and in such cases the jurisdiction of equity attaches. This is not ordinarily the case for the sale of stock.

I shall not cite the numerous authorities easily accessible in support of these propositions.

I will further remark that contracts for the sale or assignment of things in action may be enforced by the purchaser, by compelling a transfer and delivery where the legal damages might be too uncertain and conjectural to constitute an adequate compensation.

And since the remedy must be mutual the vendor may also maintain the action in such cases.

In respect to stocks it is the settled rule in England and the United States that contracts for public securities, government stocks, bonds, etc., will not be enforced, since they are always to be bought in the market.

But contracts for the sale of railway and other business corporations, and shares and bonds will be enforced in England.

The recent English reports abound in such cases. But in the United States all such securities are ordinarily

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purchasable in the market; and the rule is settled by the weight of authority, although there are some cases to the contrary, that contracts concerning stocks and bonds of corporations, like those concerning government securities, will not be specifically enforced.

I deem it unnecessary to refer particularly to the many authorities which support these propositions.

In the case of *Godwin v. Collins*, 4 Houston, 28, which was an appeal from *Chancellor* Bates, the court of appeals announced the following principles: "The general doctrine of a court of equity is that decreeing of specific performance of a contract is discretionary, especially in those cases in which the party may have adequate compensation at law in the shape of damages for the injury actually sustained; for in such cases the court will not feel itself bound to interfere, but will leave him to pursue his remedy in a court of law. In these cases it is not what a court of equity must do, but rather what it may justly do under the circumstances.

"In the case of a contract in respect to the sale of land, it must be in writing according to the Statute of Frauds; and it must be . . . so complete and perfect, indeed, as to manifest clearly the terms of the contract and the intention of the parties; and as it is required to be in writing, the writing must speak for itself. Defects cannot be supplied in it. It must be certain in itself, or capable of being reduced to certainty; by reference to something else which is thus made a part of it, so that the terms of it, and the intention of the parties, can be ascertained with reasonable precision. These rules may, however, be modified in cases of fraud, or part performance of the contract, when they exist.

"But when the case stands on the naked agreement alone, and the complainant has not been put in possession of the property, nor has made any improvement, nor ex-

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pende any money on it, nor has in any respect been led in consequence of the agreement to do anything which has resulted to his detriment, the court will not decree the specific performance of it.

“ And where the stipulation in the agreement is that one half of the purchase money is to be paid by the purchaser on the day the possession of the premises is to be given, and the remainder in installments of \$500 each, payable with interest annually, commencing January 1, 1868, but without any provision in it for securing such deferred payments, the court will not supply the omission of it, or infer that it was the understanding and intention of the parties that they were to be secured in the usual method in such sales, by bond and mortgage, or decree a specific performance of the agreement, notwithstanding the complainant tenders one half of the purchase money on the day appointed, and his bond and mortgage on the premises for the deferred payments as stipulated, and in his bill submits himself to the order and direction of the court in that particular. The vendor's equitable lien for the unpaid purchase money, at best, would be but a very imperfect and inadequate security.

“ The exercise of a sound discretion according to the circumstances of each particular case lies at the very foundation of this extraordinary jurisdiction of specific performance of contracts; and the court, though not exempt from the general rules and principles of equity in granting or withholding relief, uniformly acts with greater freedom than when exercising its ordinary powers.”

The agreement in *Goodwin v. Collins* was as follows :

Rec'd Aug. 20, '66, of D. C. Godwin, ten dolls. in part payment of the purchase money of the farm and premises where I now live, containing sixty-six acres, possession to be given on or before Jan. 1, 1867, clear of

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all taxes or incumbrances whatever, four thousand dolls. to be paid when possession given, the remainder in installments of \$500 each, payable with interest annually, commencing Jan. 1, 1868; the said Godwin to have the privilege of anticipating the deferred payment.

Witness my hand and seal.

S. M. COLLINS [Seal]

The whole purchase money to be eight thousand dollars (\$8,000).

S. M. COLLINS.

The chancellor refused to decree a specific performance of this contract, and on appeal the court of appeals affirmed his decree, dismissing the bill.

The contract between Todd and McCullough, which is sought to be enforced in the case before me, is as follows:

WILMINGTON, DEL., Sept. 21, 1881.

GEO. W. TODD:

Dear Sir,—I will sell my entire interest in the Diamond State Iron Co. (which includes my stock, and amount to my credit of the surplus fund) for the sum of \$10,500; of this amount I will take \$3,000 cash November 1, 1881, and the balance due me, \$7,500, you can pay me along as it suits you, within and during the next five years, say by November 1, 1886. Interest to be computed at the rate of 5 per cent per annum from November 1, 1881. Accrued interest on my stock and on the amount to my credit of the surplus fund, to go with the stock, and is included in the above \$10,500.

(Witness at signing)

JOHN W. TODD.

J. T. MCCULLOUGH.

Indorsed across the face of the above is the following:

WILMINGTON, Sept. 21, 1881.

I hereby accept your offer for your entire interest this

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day in the Diamond State Iron Company as per this letter.

GEORGE W. TODD.

The above letter was written by Todd, and signed by McCullough. The indorsement thereon was written and signed by Todd.

To give effect to the claim of Todd in this suit, and to make a decree in his favor, would be to give him all the benefit under this contract that could be given to him in a suit by him against McCullough for the specific performance of the contract, and this is in substance what he asks to be done by his answer, and such doubtless is the understanding of his solicitors who drew that answer.

The second and third prayers incorporated in that answer are as follows: "That the said McCullough be decreed specifically to perform his said agreement for the sale of his entire interest in said company, and to transfer to the defendant said 105 shares of the stock of said company and all of his share in the surplus fund of said company, and all the scrip and cash dividends which have accrued or may accrue, or which have been declared, or may be declared on said stock, and the interest thereon, and to deliver up to the said defendant all certificates and papers in his possession or control relating to the same, he (the said defendant) paying the said purchase money as the court may direct; that the said company be decreed to pay and deliver to the said defendant all the share of the said McCullough in the surplus fund of said company, and all the unpaid scrip and cash dividends which have accrued or may accrue, or which have been declared on said stock, and the interest thereon, and all certificates relating to said stock and said scrip dividends, and all moneys due from said company on account of said stock; and that said company be decreed to do and per-

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form, and suffer and permit to be done and performed, all such acts and things as may be necessary for the transfer to the said defendant of the entire interest of said McCullough in said company."

It is not pretended that the cash payment of \$3,000 was made on the first day of December, 1881; and it is not stated in the contract that the stock of McCullough and his credit in the surplus fund which is included in the contract to sell his entire interest in the Diamond State Iron Company were to be transferred on the first day of December, 1881, or when said cash payment should be made. Nor does the contract contain any stipulation in this respect.

That such transfer was to be made December 1, 1881, can at most only be a matter of inference. And this inference would necessarily lead to the further and greater inference that McCullough was to transfer all his interest in the company for less than one third of the contract price, without any security for more than two thirds of that contract price, and without any stipulation in respect to the payment thereof before November, 1886.

The contract contains no stipulation as to the time when the interest or any part thereof was to be paid on the sum of \$7,500.

The only thing stated in the contract in respect to the payment of the \$7,500 is that he, Todd, could pay that sum "along as it might suit him within and during the next five years, say by November the first, 1886." The contract fixes no time for its payment or any part thereof, previous to November 1, 1886. No security for its payment or any part thereof before that period, or even at that period was provided for in the contract; and to any demand by McCullough on Todd for the payment of that balance or any part thereof, a sufficient answer by him would be that it did not suit him to make any payment in respect to the same.

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The contract contains no stipulation as to the times when interest should be paid on the sum of \$7,500, the deferred payment. It does not stipulate that the interest should be paid annually, so that Todd might refuse to pay any interest before November 1, 1886.

The only stipulation in this respect was that the interest should be computed at the rate of 5 per cent per annum from November 1, 1881.

Todd does not agree that interest should be paid annually on that sum, but that the interest on the sum of \$7,500, which was payable on November 1, 1886, should be computed at the rate of 5 per cent per annum; and the contract does not state definitely and with certainty at what periods such interest should be paid.

A contract to be specifically enforced must be without ambiguity and uncertainty; it cannot be merely the subject of inference.

It must in its terms be clear, definite and certain. It must be a contract by the parties to it, and not a contract made by the court for the parties. It cannot be changed, altered, or varied by any tribunal, legal or equitable. It must be complete and perfect in itself, and certain in all its provisions. For these reasons alone the court could not decree the specific performance of said contract.

The solicitors for Todd attempt to distinguish this case from the case of *Godwin v. Collins*, *supra*, in these respects:

1. The subject-matter is not real estate, but shares of stock; and provision for security is not uniformly or usually inserted in contracts for the sale of the latter as of the former.

2. In this case the failure to claim security is evidence of security.

3. There is here no uncertainty in the character and meaning of the contract.

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4. Ambiguity, real or imaginary, as to payments of interest, or as to time of transfer, and the omission of provision as to security, are rendered wholly unimportant and immaterial by the tender of full payment.

5. The balance of the price would be put in no jeopardy by a decree of specific performance in this case.

6. The questions here arise in an interpleader suit.

I do not think these attempted distinctions are tenable. It must be borne in mind that the writing, termed the contract, which Todd drew and which McCullough signed and which is the only one, if any, under which Todd can claim the stock, dividends and scrip of McCullough in the Diamond State Iron Company, is the only contract between the parties in respect to the same. It is this contract and no other which this court could specifically enforce; and Todd can have the advantage of no contract in this case which a court of equity would not specifically enforce upon a bill filed for that purpose. It matters not that a contract relates to personalty, and not to land. It is true that a contract in respect to the sale of land must be in writing and that this is not generally necessary in respect to the sale of personalty; but this particular contract was in writing, and being reduced to writing it speaks for itself, and a court of equity no more than a court of law has any right to add to or subtract from its provisions. And the declaration that the provision for security is not uniformly or usually inserted in contracts for the sale of shares of stock as it is in the sale of land is simply assertion without proof and without reason; and all the reasons for the nonenforcement of a contract in respect to land equally apply in respect to contracts for the sale of shares of stock in this respect, nor is it reasonable to assert that the failure to claim security is evidence of security more in the one case than in the other. As to there being no uncertainty in the

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character and meaning of the contract between McCullough and Todd, I cannot perceive that it is less wanting in certainty, especially in reference to the payment of the balance of \$7,500, than the contract between Collins and Godwin. It is certainly much more unreasonable and much more wanting in consideration and deliberation in that it only specifies that the payment of the large sum of \$7,500 might be paid along as it might suit Todd within and during the next five years, say by November the first, 1886; and all the remarks made by *Chief Justice Gilpin* in the case of *Godwin v. Collins*, upon appeal, in respect to the payment of interest, are equally applicable to the contract as between McCullough and Todd.

In respect to the fourth distinction as to ambiguity, as to the payment of interest, as to time of transfer and omission of provision as to security, and the allegation that they are held wholly unimportant and immaterial by the tender of a full payment, a sufficient answer is to be found in the fact that such tender was not made before or at the time the contract was signed nor by the first of November, 1886, but afterwards, if made at all. It seems to have been an offer by letter merely, and only when McCullough had discovered that his interests in the company was much more valuable than what the writing purporting to be a contract had led him to suppose them to be, and therefore had refused to comply with the contract. No governing weight can be given to the allegation that "the balance of the price would be put in no jeopardy by a decree of specific performance in this case;" because, if the contract in this case is determined by its own terms and provisions, much greater jeopardy would exist in it than in the case of *Godwin v. Collins*, in which latter case a mortgage to secure the balance of the purchase money was tendered by Godwin, the purchaser.

It is wholly immaterial that the questions arising in this case arise in an interpleader suit.

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They are no more or less, in principle and effect, than those which would arise in a suit for specific performance of the contract. I think that the objections stated by *Chancellor Bates* to a decree for a specific performance in the case of *Godwin v. Collins*, founded upon the want of certainty and security in reference to the deferred payments and those stated by *Chief Justice Gilpin* upon an appeal in the same case and founded upon the want of consideration and deliberation, evidenced in the contract in that case, equally apply to the present case.

I shall not enter into an examination fully of all the testimony in this case. It is sufficient to remark that no one, in my opinion, upon reading that testimony, can fail to be impressed with the fact that the situation of the parties to the contract, in respect to the value of the interest of McCullough in the Diamond State Iron Company, was not equal, but greatly and amazingly unequal.

Todd had the means of knowing, and doubtless did know, with much greater certainty and accuracy the value of those interests than McCullough. He was not only a stockholder, as was McCullough, in the company, but he was its secretary. It is not necessary to decide that being such secretary to the company he sustained a relation of trust and special confidence to each individual shareholder in the corporation. But being such secretary, and as such having charge of the books and records of the company and cognizant of the business affairs of the company and of its records and acts, he necessarily possessed that amount of information in respect to the value of its stock, scrip, and dividends which could not be equally known to the individual stockholders of the company. It is not necessary to determine, nor do I think it material to inquire, who commenced the negotiation, McCullough or Todd, in respect to the sale and purchase of McCullough's stock and interest in the company.

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The statements of Todd and McCullough under oath in respect to this matter are directly opposed. No one else had any knowledge in respect thereto. Possessing the advantage which Todd did as to knowledge of the value of the stock and interest of the stockholders in the company, he was bound, as a frank and honest man in the negotiation of sale and purchase of McCullough's interest in the company, not to make any statement or declaration that would impose upon or in any way mislead or deceive McCullough.

There is no testimony in this cause in respect to McCullough's business capacity which would justify the declaration that he was wholly unfit to have the management of his estate; but if the testimony in this cause is to be believed, he certainly did not evince that capacity for business transactions which is ordinarily to be expected in those possessing considerable business interests. The father of McCullough seems to have been a large stockholder in the Diamond State Iron Company. He died and his executor transferred to Jethro T. McCullough and at least one other, if not more of his children, stock in this company amounting in the share to each to \$10,500. The shares of one of these brothers Todd bought in 1879 for \$75 a share, when the par value thereof was \$100 per share; and he apportioned that stock between himself, Mendinhal, the president of the company and Smyth and Davis, officers and directors of the company. There seems to be no other portion of this stock sold or purchased afterwards until September 21, 1881, when the alleged contract between Jethro T. McCullough and Todd was entered into.

Who commenced the negotiations in respect to this contract, as before stated, does not sufficiently appear by the evidence in this cause—the testimony of Todd and McCullough thereto being flatly contradictory. In the

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letters which are in evidence, which Todd wrote to McCullough, I cannot think that he was frank or evinced that sincerity which, under the circumstances, he should have evinced. He evidently endeavored to impress McCullough with the idea that his stock in the company was not worth more than its par value. He stated that he did not know where he could place the stock. There is no proof that he even made any inquiry in respect to that matter or that he ever sought to place it anywhere than under his own control and for the interest of himself and two or three others, officers of the company who might wish to "even up" their stock. His own evidence is to the contrary. He wanted it for himself. These others were the same officers and persons among whom he divided the stock which he had theretofore in 1879 purchased from John McCullough, the brother of Jethro. His zeal for the possession of the stock was apparently greatly enhanced after the contract was signed. It was evidently much greater than it was when McCullough made inquiry of him what he would give him for his stock.

I cannot avoid the conviction, from the proofs in this cause, that the interest of Jethro T. McCullough in the Diamond State Iron Company which was agreed by him to be sold to Todd, was on the day when the contract was made worth at least not less than one half more than the amount stipulated in the contract; and that Todd knew this fact, which McCullough did not in fact know, notwithstanding he, McCullough, may have attended and did attend the meetings of the stockholders in 1880 and 1881. The dividends due on the stock and what was due on the surplus scrip in the short time after the contract was signed within the period of five years seems to have amounted to about \$9,000; not greatly unequal to the contract price of the interest agreed to be sold by McCullough to Todd.

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Now this contract between McCullough and Todd is not an executed contract, but an executory contract. This is a proceeding not to rescind the contract, but in effect, as far as the interests of Todd are concerned, to decree its specific performance. I would not under these circumstances decree a specific performance of that contract if a bill was filed for that purpose; and, considering contracts such as I have described unequal, unfair, and unjust, I shall refuse to make any decree by which Todd can avail himself of the benefits of it, but shall leave him to assert his rights under the contract to a court of law, where a jury may award him whatever damages for its violation they may believe him to have sustained. He has not proved before me that he has sustained any. He has not paid one dollar of money under the contract; but appears to have received the first payment of interest in the surplus fund.

As to the argument that this stock had no market value, and could not therefore be substituted by the purchase of similar amount in the market, it is sufficient to say that there was nothing that made it particularly valuable to Todd other than the gain he would make by the difference in price which he was to give and the real value of the stock at the time the contract was made. Indeed, this corporation seems to have been a particularly close corporation,—one which did not permit the value of its stock to be quoted in the market. It is reasonable to infer from the proofs in this case that the original shares of stock remained in the possession and control of the original holders thereof, with exception of the interest of a brother of Jethro T. McCullough, which the defendant disposed of some time previously. But the means of determining the damages which Todd had suffered, if he has suffered by reason of noncompliance with the contract, are abundant in a court of law. It

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there would be perfectly competent for him to avail himself of the testimony of every one of the eight or ten shareholders in the company to prove the value of the stock at the time of the alleged contract of purchase, and he himself as the law of this State now is might become a witness in respect thereto. There certainly would be no denial of justice should Todd's case be heard by an honest jury who might assess such damages as they believed him to have justly sustained.

Syllabus.—Statement.—Argument for plaintiff.

MIRIAM E. MOORE

vs.

SAMUEL W. DARBY *et al.*

THOMAS H. MOORE, Intervenor.

Kent, Sept. T., 1889.

*Married women; proceeds of sale in partition of lands
of tenants in common.*

A woman's share as tenant in common in the proceeds of lands, the right to the possession of which vested in her after the passage of the Married Woman's Acts, and which have been sold under direction of court for partition, will not, at the request of her husband, be invested for his benefit, but it will be paid to her absolutely.

SUIT FOR PARTITION OF CERTAIN REAL ESTATE.—On intervening petition by the husband of one of the co-owners to have her share of the proceeds of sale invested for his benefit. The facts are stated in the opinion.

Nathaniel B. Smithers, Sr., for the intervenor.

Richard R. Kenney and Edward Ridgely, contra:

The question in this case involves the construction of the several statutes in this State enacted for the benefit of married women, and these statutes are to be found in Delaware Laws, vol. 12, page 663, passed in 1865; Del. Laws, vol. 14, pages 95 and 638, passed March 1871 and 1873, respectively; Delaware Laws, vol. 15, page 289, passed 1875, and page 601, passed in 1877; Del. Laws, vol. 16, page 188, passed in 1879; Del. Laws, vol. 17, page 911, passed in 1883.

These statutes (Married Woman's Acts) are remedial

Argument for plaintiff.

statutes and should be so construed as to advance the remedy and effect the object intended to be accomplished by the Legislature. *Billings v. Baker*, 28 Barb. 343; *Johnes v. Johnes*, 3 Dow. 15.

By these statutes it is enacted that the real and personal property of a married woman "shall be her sole and separate property, and the rents, issues, and profits thereof shall not be subject to the disposal of her husband nor liable for his debts."

The effect of these statutes has been to abolish entirely the right of a tenant by the curtesy initiate. The husband has and can have no right, property, or interest whatever in his wife's real estate during coverture, and has no seisin thereof, as during coverture he cannot come at the possession or the rent and profit. He has under the statutes a possibility or chance of being tenant by the curtesy in the wife's lands in the event that he survives his wife and has by her issue born alive during coverture, capable of inheriting the estate and the wife being seised of the lands at the time of her death.

As the law now stands in our State, the right of the husband to be tenant by the curtesy in his wife's lands is dependent upon the fact not only that the issue should be born alive during coverture, but also that the wife should be seised of the lands at the time of her death.

Any alienation of the lands during the life of the wife must necessarily defeat the right of tenancy by the curtesy in the husband. *Gram v. Lobdale*, decided in the Court of Errors and Appeals in this State at the January Term A. D. 1881 (not yet reported); *Breeding v. Davis*, 77 Va. 639; *Beach v. Miller*, 51 Ill. 206; *Hill v. Chambers*, 30 Mich. 422; *Sleight v. Read*, 18 Barb. 159; *Billings v. Baker*, 28 Barb. 343; *Pool v. Blakie*, 53 Ill. 495; *Forbes v. Sweesy*, 8 Neb. 520; *Coverdale v. Gorman*,

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4 Houst. (Del.) 624; *Johnes v. Johnes*, 3 Dow. 15; *Stewart v. Ross*, 50 Miss. 776; *Greenwich Nat. Bank v. Hall*, 11 R. I. 124; *Silsby v. Bullock*, 10 Allen, 94; *Porch v. Fries*, 18 N. J. Eq. 205; *Hearle v. Greenbank*, 3 Atk. 695-716.

In the case before the court Mrs. Miriam E. Moore, wife of Thomas H. Moore, was tenant in common with her two brothers Samuel W. Darby and John C. Darby, and proceedings in partition were instituted by Mrs. Moore in her own name. By the return of the freeholders it appeared that the lands held by the tenants in common could not be divided without detriment to the parties interested, and the lands were sold by order of the chancellor, and converted into money, in accordance with the provision of section 14, chapter 86, page 530, Revised Code (1873). By these proceedings all the title and interest of Mrs. Moore in the lands were sold and alienated, and she no longer had any interest in these lands, but became entitled to her share of the purchase money—it was a conversion out and out of realty into personalty and the estate and interest of Mrs. Moore in the lands was thereby divested.

Since the passage of the Married Woman's Act in this State in 1865, more than twenty-four years ago, cases like the present have often occurred and the practice, so far as practice can, has established the right of the wife absolutely to the money, independent of her husband. The husband is not now under our practice made a party to the proceedings, and the court of chancery has uniformly since 1865 ordered the money to be paid to the wife. Prior to the Married Woman's Law when lands were sold it was considered a conversion into personalty, and the money was paid to the husband, but since the Married Woman's Law, the money has been paid directly to the wife.

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Dower is certainly as much favored in our courts as curtesy, and yet, since the organization of our state government, it is confidently believed that in proceedings in partition no precedent can be found where one of the tenants in common, being a married man and his wife living, one third of his interest in the lands has been invested or withheld from him so as to await the event of his death, leaving the wife surviving him.

Dower is certainly extinguished by these proceedings if both husband and wife are living at the time, and why not curtesy?

Since the Married Woman's Law, the husband can have no more interest in the wife's lands than the wife has in his lands,—in fact not so much,—because the right of dower is superior to any liens which the husband may create during coverture; whereas the right of curtesy is subject to any lien made and created by the wife during coverture.

In the present case S. W. Darby and John C. Darby are both married men with wives living, and yet no one will pretend that one third of their share of the purchase money should have been invested to await the event of their wives outliving them.

It may be pretended that dower is a mere right and curtesy an interest in lands. Such may have been the distinction before the laws for the benefit of married women were enacted. But since then, dower and curtesy are exactly alike, except that dower is preferred to liens created by the husband during coverture, while curtesy is not. Both now are but a right and neither tenant in dower nor tenant in curtesy have an interest until the death of the husband or the death of the wife.

Suppose a farm belonged to the wife which has been purchased by her during coverture, and for which she gave a purchase money mortgage in which her husband

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did not join, and the farm is afterwards sold on this mortgage and brings \$5,000, above paying the mortgage—will it be pretended that the sheriff, to whom the whole purchase money is paid, is not bound to pay the balance of the money, after paying the mortgage (there being no other lien) to the wife, the husband and wife both being living at the time? If not in that case, how can the wife be prevented from having her share in the present case?

To withhold this money from Mrs. Moore would be a virtual repeal of the Acts passed for the benefit of married women in all cases where a married woman was a joint tenant or tenant in common with other parties, and where proceedings were instituted for partition. It would deprive her of the control and management of this money so long as her husband lived. By the sale under the order of the court it became absolutely personal property, to which she, under the Married Woman's Law, is absolutely entitled. Before the passage of these laws it was always considered personal property and was invariably paid to the husband absolutely. But since the enactment of these laws it became and was the absolute property of the wife, for her to dispose of as she might deem proper.

Both reason and justice require that such an interpretation should be given to these statutes as to carry out their spirit and intention, and to accomplish the end intended by the Legislature—and if so interpreted will give to Mrs. Moore absolutely her share of the proceeds of the lands held by the tenants in common, after deducting therefrom the liens to which her share may be subject.

THE CHANCELLOR.—Miriam E. Moore has filed her petition in this court, praying for partition between her and her two brothers, Samuel W. Darby and John C. Darby, of lands situate in Mispillion and South Murderkill Hun-

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dreds, formerly belonging to Samuel Warren, senior. One of these tracts of land contains about 700 acres; one other contains something over 200 acres, and a third tract contains upwards of 180 acres.

Samuel Warren, senior, died in 1848. By his will, admitted to probate November 6, 1848, he devised as follows:

“Fourth. I give and devise to my beloved wife, Miriam, for and during the term of her natural life, without impeachment of waste, all that farm or tract of land with the appurtenances situate in Mispillion Hundred, Kent County, and State of Delaware, being the Mansion Farm on which Solomon Townsend, senior, and Solomon Townsend, junior, lived and died, and now in the tenure of Abner Wooters, and containing six hundred acres more or less; and from and immediately after the death of my said wife, I give and devise the said farm or tract of land, with the appurtenances unto Solomon Townsend Warren and John W. Hall and their heirs for and during the natural life of my daughter Mary Darby, now the wife of John M. Darby, upon trust, to receive the rents and profits thereof and to pay the same to my said daughter Mary during her natural life, for her sole and separate use, notwithstanding her coverture, free from the debts, management, power, and control of her now husband the said John M. Darby, or of any other husband by her hereafter to be taken, and the receipt of the said Mary alone from time to time to be a sufficient discharge and after the death of my said daughter, I give and devise the farm or tract of land aforesaid with the appurtenances unto the heirs of my said daughter Mary in fee simple absolute, clear and discharged from the trust aforesaid.

“Fifth. I give and devise unto Solomon Townsend Warren and John W. Hall and their heirs for and during

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the natural life of my daughter Mary Darby, now the wife of John M. Darby, the farm or tract of land which I purchased of Dr. Alexander Lowber near Frederica containing five hundred acres more or less with the appurtenances upon trust, to receive the rents and profits thereof and to pay the same to my said daughter Mary during her natural life, for her sole and separate use, notwithstanding her coverture, free from the debts, management, power, or control of her now husband the said John M. Darby, or of any other husband by her hereafter to be taken, and the receipt of the said Mary alone from time to time to be a sufficient discharge. And after the death of my said daughter, I give and devise the farm or tract of land aforesaid unto the heirs of my said daughter Mary in fee simple absolute, clear and discharged from the trust aforesaid."

The tract of land in Mispillion Hundred, as appears from the return of the freeholders, in fact contains about 700 acres of land and the two tracts in South Murderkill Hundred contain, as appears by said report, something over 400 acres. This discrepancy between the will of Samuel Warren, senior, and the report of the freeholders is not accounted for by any proof in the cause, but the discrepancy is immaterial, as there is no doubt that the land mentioned in the will above recited and the land of which partition is sought are the same. Thomas H. Moore has filed his petition, therein stating that he intermarried with the said Miriam E. Moore, the petitioner in the proceedings for partition on or about the 4th day of September, 1852, and had by her issue born alive and thereby became tenant by the curtesy initiate of the lands of which she was seised for and during said coverture, and that as said tenant by the curtesy initiate in the lands of his said wife, Miriam E., he has been informed and believes that he has an interest and is enti-

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tled to be made a party to said proceedings in chancery and he therefore prays that he as her husband may be made a party thereto.

He was made a party by the consent of the solicitors for the plaintiff and defendants respectively.

The freeholders appointed to make partition of the lands have reported that the same cannot be divided without detriment to the parties entitled and that they therefore have appraised the lands as by their commission they were commanded to do. The lands in respect to which partition is prayed, have been sold, the proceeds of sale paid into court, and the question is now raised by the solicitors for the husband of the petitioner whether her share of the proceeds of sale shall be paid to her absolutely, or, as they claim would be proper, shall be ordered to be invested for her benefit, the interest paid to her for life and the principal held to secure the possible right of the husband therein should he survive the wife.

An estate by the curtesy, says Cruise, quoting Littleton, vol. 1, § 1, of chap. 1, title 5, p. 107, is where a man taketh a wife seised in fee simple or in fee tail general or seised as heir in special tail, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England.

And a tenant by the curtesy of England, says Blackstone, book 2, chap. 8, p. 126, is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple, or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall on the death of his wife hold the lands for his life as tenant by the curtesy of England. There are four requisites, says Blackstone, necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife.

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1. The marriage must be canonical and legal.

2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess which is seisin in law, but an actual possession; and therefore a man shall not be tenant by the curtesy of a remainder or reversion.

3. The issue must be born alive. The husband, he says, by the birth of the child becomes tenant by the curtesy initiate, and may do many acts to charge the lands, but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.

Miriam E. Moore had not the possession nor the right to the possession of these lands or any part of them until the death of her mother, Mrs. Mary Darby. Her mother herself had not the right to their possession in her lifetime, but the right to their possession during her lifetime was in Solomon Townsend Warren and John W. Hall and their heirs during her lifetime. The right to the possession of Miriam E. Moore to any portion of these lands did not accrue until the death of her mother, Mrs. Darby, which occurred, as Mr. Moore states in his petition, on or about the 27th day of January, 1888. At this period her children Miriam E. Moore, Samuel W. Darby and John C. Darby became entitled to the possession of the lands under the will of their grandfather Samuel Warren, senior.

Before that day and before Miriam E. Moore, and of course before her husband, Thomas H. Moore, could become entitled to any portion of said lands, the Legislature of Delaware had in effect abolished the right of a tenant by the curtesy initiate in this State.

In fact, tenancy by the curtesy of England and tenancy by the curtesy as theretofore existing in Delaware ceased to exist.

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But to consider the law in reference to this subject independently of our Acts of Assembly, a man was not entitled to tenancy by the curtesy nor a woman to dower out of a reversion or a remainder expectant upon an estate of freehold; but upon a reversion expectant upon an estate for years both of these rights (of dower and of curtesy) accrue, for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. 1 Sharswood's Bl. bk. 2, chap. 8, p. 126; *Stoughton v. Leigh*, 1 Taunt. 410; *De Gray v. Richardson*, 3 Atk. 470; *Goodlittle v. Newman*, 3 Wils. 521.

The right the husband acquires by marriage in the lands of the wife is thus stated in vol. 2, p. 131, of Kent's Commentaries, Lacy's edition 1889: "If the wife, at the time of marriage, be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life, if he dies before his wife, and in that event she takes the estate again in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death the estate goes to the wife, or her heirs, and in all these cases the emblements growing upon the land at the termination of the husband's estate go to him or his representatives."

If during her life real estate is converted by operation of law into personal estate the conversion will be treated as her own. *Graham v. Dickinson*, 3 Barb. Ch. 170, 5 L. ed. 861.

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The rents, issues, and profits of the wife's lands accruing during coverture belong absolutely at common law to the husband. How effectually these common-law rights of the husband had been changed by the statutes of this State will appear by reference to those statutes, and here I will remark that these statutes are remedial in character and must be construed by courts so as to effectuate the intention of the Legislature so far as the same can reasonably and properly be done.

Our first Statute upon this subject was passed March 17, 1865, and provided "that the real estate, mortgages, stocks, and silver plate belonging to any married woman at the time of her marriage, or to which she may become entitled at any time during her coverture, shall remain and continue to be her sole and separate property, and shall not be subject to the disposition of her husband by alienation, transfer, assignment, or otherwise; or be liable to the debts or contracts of her husband, except where such debts are judgments recovered against him for her liabilities before marriage; provided, that nothing in this section shall be construed to authorize the wife to sell or otherwise dispose of her real estate, mortgages, stocks, or silver plate without her husband's consent, evidenced by writing under his hand and seal, or to authorize her to create any incumbrance upon her real estate, or to dispose of the rents, issues, and profits thereof, or the interest upon her mortgages, or dividends, or other income arising from her stocks, without his consent, evidenced in the same manner: and, provided, further, that nothing herein contained shall be construed to affect, in any manner, the rights of the husband (if he survive the wife), as tenant by the curtesy in the real estate of his wife."

The Act to secure to married women certain of their own earnings, p. 95, vol. 14, has no relation to the case before the court.

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By an Act for the protection of married women, passed April 9, 1873, vol. 14, p. 638, § 1, it was provided "that the real and personal property of any female who may hereafter marry, and which she shall own at the time of her marriage, or that any female now married may receive by gift, grant, devise, or bequest from any person other than her husband, shall be her sole and separate property, and the rents, issues, and profits thereof shall not be subject to the disposal of her husband nor liable for his debts."

This last Act was amended March 17, 1875, by striking out said first section and inserting among other things, in lieu thereof: "Section 1. That the real and personal property of any married woman, which has been heretofore acquired, is now held, or which she may hereafter acquire in any manner whatsoever, from any person other than her husband, shall be her sole and separate property, and the rents, issues, and profits thereof shall not be subject to the disposal of her husband, nor liable for his debts."

These are the portions of our Acts properly known as Married Women's Acts having relation to the question now before me. Regarded as remedial, and construed so as to advance the remedy and effect the object intended to be accomplished by the Legislature, what are their effects in the case before me?

Mrs. Miriam E. Moore was not entitled to the possession of these lands or any portion of them until the 27th day of January, 1888, the day of the death of Mrs. Darby, and the day on which the estates of Solomon Townsend Warren and John W. Hall, trustees thereof, expired. Thomas H. Moore had not then and has not since had any estate and no interest in said lands. He has not had the legal right to enter upon or into the possession of said lands for any purpose whatever; he is not entitled

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to the perception of the rents and profits of said lands or any part thereof during the lifetime of his wife; he has no estate by the curtesy initiate therein; he is entitled only to the possibility of entering into the possession of his wife's interest therein and enjoying the possession thereof during his lifetime in case he survives his wife, and in case no partition thereof be made between the tenants in common thereof, and unless the conversion of the wife's interest therein into money be in fact and in law not an absolute conversion, but a qualified conversion only. Would such a conversion of land into money under these circumstances have the effect of securing to Thomas H. Moore the preservation and enjoyment of the principal sum of money adjudged as the value of the wife's interest in the lands under the proceedings in partition in this cause?

The doctrine of conversion was thus stated by an eminent English equity judge in a leading case upon this subject: "Nothing is better settled than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid. Whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally." See 1 Pom. Eq. Jur. § 161, and authorities cited.

The principle properly applicable to this case was decided by the superior court at its fall session in 1874 in the case of *State, for the use of Samuel D. Coverdale, versus Randall B. Gorman and others*.

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The court decided in that case that under the Act for Married Women, passed in 1865, a wife's interest in a recognizance in the orphan's court on the assignment of the real estate of a deceased father cannot be attached for the debts of her husband, except for such as are properly provided for in it.

In that case the court said: They considered that it would be contrary to the spirit and policy as well as the intention of the Statute of 1865, for the benefit of married women, to now hold that a wife's sole and separate interest in the real estate of her deceased father secured by recognizance in the orphan's court may be attached for the debt of her husband except such debts as are specially provided for in it. *Jefferson v. Brady*, 4 Houst. (Del.) 626.

If I understood the argument of the solicitors for Thomas H. Moore, the husband of Miriam E. Moore, it was that the conversion of the interests of Mrs. Moore and her brothers by a decree of a court of chancery of the real estate belonging to them in common was not a conversion out and out, but a special conversion for the purposes of partition only; and that the share of Mrs. Moore in the amount of the sales of the lands made under the order of the court in this partition cause should not be ordered paid to her absolutely, but that she should be required to give security for her proportion of such sale, so that in case her husband should survive her that amount should be secured so that her husband, in case he should survive her, might have the enjoyment of it during his life as tenant by the curtesy therein.

The position of the counsel for Mr. Moore is not in my opinion tenable. It is not supported by a proper consideration of our Acts of Assembly in reference to the estates of married women, or of the doctrine of conversion as supported by adjudged cases.

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Partition of estates held in common is a necessary incident of such estates.

Where such estates cannot in fact be divided between tenants in common the law requires that they shall be valued in money, and that such valuation shall be returned to this court by the freeholders appointed to make partition or valuation. Such valuation being returned to the court, its duty is to decree a sale by a trustee to be appointed for that purpose, the trustee making sale under the authority of his appointment for that purpose. It is the duty of the court to decree the payment to each tenant in common subject only to costs and liens against them respectively.

No decision contrary to the principles here announced has been made by me since I have exercised the duties of chancellor, and none, I presume, have been made to the contrary, by any of my predecessors in office when their attention has been properly called to the provisions of our Acts of Assembly in respect to the rights of married women.

Let a decree be drawn for the payment to Mrs. Moore of her share of the proceeds of sale of the lands held in common by her and her brothers.

Syllabus.—Statement.—Argument for complainants.

WILLIAM G. BRYAN *et al.**vs.*

REBECCA P. MILBY.

Kent, Sept. T., 1890.

Will; obligatory trust created by will.

No obligatory trust is created by a will giving all of testator's estate to his wife with a request that if she does not require the whole of it as a support, she will, at her death, will the remainder to certain other persons named.

BILL FILED IN KENT COUNTY.—This bill was filed by the children of Charles A. Bryan to establish a trust in certain money alleged to have been loaned to defendant by Mary R. Bryan, deceased, and to recover such money for the benefit of complainants, the alleged *cestuis que trustent*. The case sufficiently appears in the opinion.

J. Alexander Fulton, for the complainants:

Precatory words in a will create a trust. But the objects of the bounty must be sufficiently described, and the property sufficiently defined. 2 Bouvier, L. Dict. 364.

This is the doctrine of the courts, stated in its briefest form, by our lexicographers. These are to be received as authority to this extent, that they are supposed to give true definitions as announced by the courts and to be received and acted upon by the bar.

We have it stated more at large in the text-books. By a very eminent writer, universally recognized as an authority of the highest repute, it is stated in these words: "It has long been settled that words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee make him a trustee for the person or

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persons in whose favor such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object or objects of the intended trust." 1 Jarman, Wills, 2d Am. ed. 1849, 332; Little & Brown's ed. 1881, p. 385.

Judge Story states the rule thus: "In the interpretation of the language of wills also, courts of equity have gone great lengths, by creating implied or constructive trusts from mere recommendatory and precatory words of the testator. Thus, if a testator should by his will desire his executor to give to a particular person a certain sum of money, it would be construed to be a legacy; although the will should leave it to the executor's own free will, how and when, and in what manner, it should be paid." 2 Story, Eq. 2d ed. § 1068.

This, then, is the rule as laid down in the lexicons and in the text-books, both English and American. It seems to be founded in reason and equity. It is the one we invoke and insist upon in the case now before the court, and for the first time in our judicial history. If it is not just in itself, and suited to our condition, the burden of showing this rests with the respondent.

I shall now attempt to show that the complainants are within the rule, as thus defined, and this I shall do both by the terms of the will itself, and by the authorities I shall cite in illustration of the rule and its application.

Now as to the terms of the will.

And first as to its intent.

This is to be ascertained from the will itself, aided by the surrounding circumstances. From the will; first, by the precatory words themselves; and secondly, by the contest. The will is both short and clear, and we shall not have much difficulty in arriving at the true intent of the testator if we keep it before us. The precatory

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words are, "And I do *request* my wife, if she shall not *require* the whole of my real estate *as a support*, that she will will at her death the remainder to the children of my brother Charles Bryan, of Cecil County, Maryland."

From these words it is plain that the testator had two objects of his bounty in view. The first was his wife; and the first and principal provision was for her support as long as she lived. From the very nature of the case this must be uncertain. She might live a long or a short time. If she retained her good health, she would require less than if stricken by disease. But whatever the circumstances might be, she was to be supported out of his estate, even if it took the whole. But it was only support. No provision was made for anything else. She might not waste it, she might not spend it for other purposes; she must not give it to strangers, for by so doing the second purpose and intent of the testator would be defeated, namely, the provision for his brother Charles' children. In other words he says: "My wife is to be supported, even if it should take the whole of my estate to do so; but whatever is not required for this purpose, goes to my brother Charles' children." This is the clause of the will that contains the precatory words, and makes provision for these children. I contend that even taken alone they clearly show the intent of the testator to provide for them after the support of his wife had been secured. But this conclusion is greatly strengthened, indeed placed beyond doubt, when we come to consider the context of this will. In the first place the estate, both real and personal, is given to his wife, Mary R. Bryan. And observe here, that although the bulk of it was real, yet no words of inheritance are used. It may be argued that these were not necessary to convey the fee, yet their omission is a noticeable fact when we come

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to seek for the intent of the testator. But it is not even necessary to insist upon this interpretation, reasonable and natural as it seems to be; for the subsequent words, following immediately in the same sentence, seem to leave no doubt about the testator's intent, and show clearly that his wife was not to take an absolute estate, without any limit or restriction as to how and for what purpose it should be spent. The words that limit and restrict her to the use and application of the estate are these: "And I do hereby authorize and direct my executor hereinafter named to sell my real estate, as soon as it can be sold to advantage, and to invest the money in good stocks or bonds." If we consider carefully the language here used we surely cannot fail to see that the interest in the estate given Mrs. Bryan was not an absolute and unqualified one but one limited and confined to a single purpose, her own support. The words here used by the testator are not words of suggestion, desire, or wish, or even advice; but of command and direction. The first are, "I do hereby authorize and direct." They are most positive and imperative, and in the present tense. There is no uncertainty or contingency of any kind. If the previous gift was an absolute one of the whole interest in the entire property, what need or propriety could there be in authorizing her to do what she already had the absolute right and power to do? To authorize is to grant a power and confer an authority not before possessed. To direct is to say how a thing shall be done. But it would be folly to address such words to a person who already had the authority to act according to his own free will as it is contended here that Mrs. Bryan had, and which would be true if she had taken an absolute interest by the preceding clause of the same sentence. But this is not all the direction the testator had to give regarding his property. In the same sentence he goes

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on to say what shall be done with the proceeds after his estate has been converted into ready money.

He further "authorizes and directs" her "to invest the money in good stocks or bonds." If he had already given it her absolutely there would be neither propriety nor sense in using such language.

Again, "if she shall not require the whole of my estate as a support," he requests her to will it to the children of his brother Charles. What is the meaning of the word "require" as used here? It excludes the idea of an unqualified estate and unlimited control and discretion, and manifests a clear intention to limit the use while she lived and direct the disposal of the remainder at her death.

From the foregoing considerations it is plain that the intent of the testator was to provide for the support of his widow during life, and that whatever remained at her death should go to the children of his brother Charles, the complainants here. The testator had no children of his own.

If this be the intent of the testator, it should end the controversy; for it is a cardinal principle, recognized and declared by all courts, that in the construction of wills, the intention of the testator is the first object of inquiry, and when found, that it must be fully carried out, and control the disposition of the estate.

The principle that precatory words, when used in a will, are imperative, and must be so regarded, has long been established. The reason of the rule has already been stated. It is that the testator, having full power over his estate, to dispose of it as he pleases, need not express his will in the stern and imperious language of a master, addressing an inferior, but may rather employ the gentler phrase of courtesy as addressing a friend and equal, whose pleasure it will be to carry out his wishes,

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even after he has departed. Recognizing the principle and its propriety, the courts in England at a very early day so declared, and since have uniformly held, "that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the object or objects of the intended trusts." The same principle has been adopted, and the same rule followed, with a few exceptions only, in this country.

A host of authorities, both English and American, might be cited; but it would be almost an endless task without any corresponding profit. The difficulty arising in the numerous cases has not been in regard to the principle, for that has been acknowledged over and over again to be settled, but in its application to the special facts, or circumstances of each case; and the question in almost every instance has been as to the certainty of the subject or the object.

On this point there has arisen some diversity of views among the judges, as was very natural and to be expected. Some have been more strict than others; but the main current of the decisions has flowed on in one strong, uniform, and unbroken stream; and the rule on this question of certainty has been, that where the object and the subject can be discovered from the will itself, or the will and surrounding circumstances; or where the court, by the exercise of its usual powers and functions can ascertain the subject of the gift and the persons to be benefited,—the trust shall not fail because of uncertainty.

Without dwelling longer upon this point, we respectfully cite the court to the following authorities. An examination of these will clearly show that our case

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comes within both their letter and spirit. 1 Jarman, Wills, 2d Am. ed. 332; 2 Story, Eq. § 1068; *Malim v. Keigley*, 2 Ves. Jr. 333; *Wilson v. Major*, 11 Ves. Jr. 205; *Wright v. Atkyns*, 17 Ves. Jr. 255; *Parsons v. Baker*, 18 Ves. Jr. 476; *Briggs v. Penny*, 8 Eng. L. & Eq. 231; *Coates' App.* 2 Pa. 129; *McKonkey's App.* 13 Pa. 253; *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718; *Ingram v. Fraley*, 29 Ga. 553; *Henderson v. Blackburn*, 104 Ill. 227, 44 Am. Rep. 780; *Bull v. Bull*, 8 Conn. 48, 20 Am. Dec. 86; *Hall v. Otis*, 71 Me. 326.

Even if the chancellor should have any doubt of the correctness of the principle here contended for or the propriety of its application in this State, it should be resolved in favor of the complainants upon these considerations: This is a Virginia case. The testator was domiciled there at the time of his death. The will was proved there. The estate was there. Now the rule in such cases is that the law of the testator's domicile shall direct the course of distribution. Williams on Executors, 366, states: "It is now a clearly established rule that the law of the country in which the deceased was domiciled at the time of his death not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will without regard to the place either of birth or death, or the situation of the property at that time."

The rule above contended for is the one adopted and acted upon in Virginia. *Harrison v. Harrison*, 2 Gratt. 1, 44 Am. Dec. 365.

Nathaniel B. Smithers, Sr., for the defendant:

Whether or no there was any trust created depends upon the proper construction of the will of the testator.

The proper construction is :

1. That the bequest to Mary R. Bryan was of the

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whole estate of the testator, subject only to the payment of his debts.

2. That by the direction to sell, the real estate was converted into personalty and as such passed to the widow.

3. That the terms of the bequest being unlimited, the residue, after payment of debts, passed to her as an absolute gift.

4. The absolute nature of the gift is more clearly indicated by the clause directing that no security should be given by her, as executrix, nor any appraisement be made of his estate.

5. That Mary R. Bryan had the power and right to spend any part or all of the residue so given and whether she did so or not was a matter wholly within her discretion.

6. That there was no bequest by the testator to the children of his brother, nor any benefit directly conferred,—but if anything was to come to them it was to be wholly by and through the will of Mary R. Bryan,—to be made in pursuance of the testator's request, and the subject to be contingent upon whether anything should be left of that which had been bequeathed to her.

Such being the proper construction of the will of William A. Bryan, the defendant rests upon this well-established principle,—that whenever a bequest is made in terms importing an absolute gift, precatory words will never be construed as creating a trust, if either they ought not upon the whole will to be considered as imperative, or if the subject-matter of the request be uncertain, or if the objects intended to be benefited be not clearly ascertained—and all these three requisites must co-exist. And if in any gift there is manifest an intention to give to the devisee a right or power to dispose of the property so given, and by using such right to leave more or less or nothing upon which such trust would

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operate, then such precatory words will never be construed as imperative.

This principle is found in Lewin, Tr. 134, and *Harding v. Glynn*, 1 Atk. 469, 2 Lead. Cas. Eq. 4th Am. ed. 1079-1082, 1086, 1087.

I now propose to examine whether this principle is sustained by adjudicated cases.

Bland v. Bland, 2 Cox, Ch. 349, decided by Lord Hardwicke in 1745, though there are a few cases preceding this, is the first leading authority. It arose upon a clause in the will of Lady Ann Bland, who after devising certain real and personal estate to her son, Sir John Bland, absolutely, adds: "And it is my earnest request to my son, that on failure of issue of his body he will sometime in his lifetime, either by will or other writing, settle the said premises or so much thereof as he shall stand seised of at the time of his decease, so and in such manner as that on failure of issue of his body the same may come to my daughter Mrs. Jacob and the heirs of her body."

It was urged that this request was a direction to settle and was imperative, but it was ruled by the Chancellor that it was not, but that the estate being given absolutely, he had power to dispose of the same, and as the request only affected so much as he should stand seised of at his death, it was as much as if the testatrix had said, "I leave you to dispose of as you think fit, but I shall be glad if you will give as much as you can spare, so and so."

In the course of his opinion the chancellor quotes the previous case of *Atty-Gen. v. Hall*, Fitzg. 314, decided in 1735, which arose upon the will of Thomas Hall, in which he gave to his son Francis and the heirs of his body all his personal estate, but if Francis should depart this life leaving no heirs of his body, then he gave so much as his son should be possessed of at the time of his

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death to the Corporation of Goldsmiths upon trust for charities.

Francis died and bill was filed by the attorney-general to have the estate applied to charities. It was held that the bequest did not take place, and the opinion was founded upon the clause "so much thereof as he shall be possessed of at the time of his death," which imported that his son should have the clear property.

After applying this, the chancellor proceeds in relation to the case before him. "She," Mrs. Bland, "takes it for granted from his having the fee that he could sell and dispose of it as he pleased, and therefore she requests, and by the whole framing of the will this request is subject to his, John Bland's, direction. I do not lay it down that in a will a request may not amount to a legacy, but it should be limited to some certain thing or for some certain part of a thing and not left absolutely to the pleasure of the person to whom the request is made."

Nothing could be more applicable to describe the will of William A. Bryan. His widow took his whole estate absolutely. She had power to expend the whole,—it was entirely at her pleasure whether anything should be left,—if anything should be left he requested that she would bequeath as he desired, but the whole subject-matter was committed to her discretion.

I have cited this case at length, not only on account of the eminence of the judge, but as the leading case universally cited and followed.

Wynne v. Hawkins, 1 Bro. Ch. 179 (*Lord Thurlow*), 1782, devises to testator's wife "not doubting but that she will dispose of what shall be left at her death to our two grandchildren" not sufficiently certain to raise a trust.

It was argued for the plaintiff, a grandchild, against the personal representative of the wife who had died intestate that by force of the words "not doubting" there was a trust.

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For the defendant *Bland v. Bland* was cited and the chancellor dismissed the bill, saying in the course of his opinion: "If a bill had been filed in the lifetime of the wife could I have ordered the money laid out and that she should receive the interest for her life and then that it should go over. If the intention is clear what was to be given and to whom, I should think the words 'not doubting' would be strong enough. But where in point of context it is uncertain what property was to be given and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed. Here he looked upon the provision made by the father of the grandchildren as an ample provision, and meant this fortune to pass through the pleasure of his wife, leaving it to her to use what she pleased and consequently to make the residue such as she chose."

The principle of the decision was the want of certainty in the subject-matter. The *request* having reference only to what might be left at the death of the first devisee. In this it is precisely similar to the will of William A. Bryan.

Pierson v. Garnet, 2 Bro. Ch. 38, 226, Lloyd Kenyon, *M. R.*, 1786, on appeal, *Lord Thurlow*, *Ld. Ch.* 1787, was thoroughly argued. The decisions, both above and below, were in favor of a trust, but the principle of the preceding cases is maintained and the difference illustrated.

The question arose under the will of John Garnet, Bishop of Clogher, who by his will gave to Samuel Salt in trust to pay certain annuities and subject thereto to permit and suffer Peter Pierson, the complainant, to receive the whole of the residue of the proceeds, interest and profits of the said fund to be placed out at interest after the payment of the said annuities for and during his natural life and from and after the death of the annuitants I bequeath the said residue to the said Peter

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Pierson, his executors, administrators, and assigns, and it is my dying request to the said Peter Pierson that if he shall die without leaving issue living at his death, that the said Peter Pierson do dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt Anne Coppinger, his grandmother, in such manner and proportion as he shall think proper."

The question was whether these words were recommendatory or imperative and raised a trust for the descendants of Anne Coppinger.

Now it will be observed, and was admitted, that the gift itself was certain being of the whole of "what fortune he should receive under this my will," and the contest was whether the *objects* were sufficiently marked by the words "the descendants of my late aunt Anne Coppinger."

Inasmuch as the question could not properly arise until the death of Peter Pierson without issue living, the Master was disinclined to consider the matter, but being pressed, yielded and ruled that the words created a trust, and in the course of his opinion says: "The principles appear to be those recognized by *Lord* Thurlow in the cases of *Harland v. Trigg*, 1 Bro. Ch. 142, and *Wynne v. Hawkins*, Id. 179, that where the property to be given is certain, and the objects to whom it is given are certain, there a trust is to be created." *Bland v. Bland* having been cited, his Honor observed in regard to it: "The property was not certain, being the whole of what he should be seised of at his death and leaving him an absolute control over the property during his life," and in reference to *Le Maitre v. Bannister*, where the words were, "to do justice to A. and her children, but if any circumstances should occur to make it necessary, the devisee was to be at liberty to dispose of it,"

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the judge said: "There one of the circumstances was wanting, for the devisee could dispose during his life,"—thus recognizing the distinction already established that if there was power to diminish or destroy the fund there could be no trust.

On appeal the decision was affirmed by Thurlow, *Ld. Ch.* (p. 230), who says: "In this case the devisee only takes an estate for life in the produce of the fund. The intention of the testator was that if he had children he should take an absolute power of disposal; if not it should go to the descendants of his aunt."

Having thus determined that Peter Pierson had no power to appropriate any part of the principal and that the words "descendants of Anne Coppinger" constituted a sufficient description, the two requisites of certainty of subject and object were present.

The case of *Sprange v. Barnard*, 2 Bro. Ch. 585, Rolls, Lloyd Kenyon, 1789, occurring within two years, and decided by the same judge, not only confirms *Bland v. Bland*, *Le Maître v. Bannister*, and *Wynne v. Hawkins*, but shows that *Pierson v. Garnet* was in entire accord with the principle thereby established.

The words of the will made in execution of a power were: "This is my last will and testament at my death for my husband Thomas Sprange, to bewill to him the sum of £300 which is now in the joint-stock annuities for his own sole use; and at his death the remaining part of what is left that he does not want for his own wants and use to be divided between my brother John Crapps, my sister Wickenden and my sister Barden, to be equally divided between them."

The stock was standing in the name of trustees. The wife died and Sprange, the husband, applied for a transfer of the stock, claiming it absolutely. The trustees refused. The bill was filed by Sprange, and all in inter-

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est made parties. It was contended for those in remainder that Sprange was only intended to take for life—that there was a trust—and that the property should be impounded.

The master of the rolls says: “It is contended for the persons to whom it is given in remainder that he shall only have it for life and that the words are strictly mandatory on him to dispose of it in a certain way, but it is only to dispose of what he has no occasion for; therefore the question is whether he may not call for the whole, and it seems to me perfectly clear on all the authorities that he may. I agree with the doctrine in *Pierson v. Garnet*, following the cases of *Harland v. Trigg*, and *Wynne v. Hawkins*, that the property and the person to whom it is to be given must be certain, in order to raise a trust. Now here the property is wasting, as it is only what shall remain at his death. The cases are so much in point that they are scarce worth mentioning; they are *Bland v. Bland*, *Le Maitre v. Bannister*, *Wynne v. Hawkins*, where not doubting would have been sufficient to have raised the trust had it not been for the uncertainty of the following words. . . . Then the present case is ‘so much as he shall not want for his wants.’ It is contended that the court ought to impound the property; but it appears to me to be a trust which would be impossible to be executed. I must therefore declare him to be absolutely entitled to the £300 and decree it to be transferred to him.”

In this bequest the words were “the remaining part of what is left that he does not want for his own wants and use”—in the will of William A. Bryan the request is “if she shall not require the whole of my estate as a support that she will will at her death the remainder.”

Comment is unnecessary to show the identical character of the bequests—that in each case the property was

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wasting and uncertain, and wholly dependent upon the devisee whether there would be much or little or anything to form the subject of a trust.

In *Malim v. Keighley*, 2 Ves. Jr. 333, 529, before Sir Richard Pepper Arden, *M. R.*, affirmed Lord Alvanley, 1794, Lord Chancellor Loughborough, 1795; the trust was established, both below and on appeal. The question arose on the will of Thomas Lowe, who after bequests to his daughters severally for life, with provisions for sinking the shares of such as should die without children into the residue, and giving the residue in three parts and with proviso: "In case the whole of the residue of my personal estate shall become vested in any one of my said daughters, then I do give and bequeath the same" (after the determination of the trusts) "unto such surviving daughter, her executors and administrators, hereby recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid unto and among the children of my said daughter Anne Malim and my nephew, John Lowe, of Ferry Bridge, desiring that his reputed daughter Emilia, though born before marriage, may be considered as one of his children."

The whole residue became vested in Sarah, one of the testator's daughters, who married Keighley, and she dying without issue and intestate, the question was whether there was a trust for the children of Anne Malim and John Lowe.

Now by recurring to the terms of the bequest it will be observed that the recommendation covered the whole of the property received from the testator, and that there was no power in the legatee to dispose of any part of the principal.

The master of the rolls decided that it was a trust and in the course of his opinion lays down the rule which in

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subsequent cases has been so often referred to, in these words: "Whenever any person gives property and points out the object, the property and the way it shall go, that does create a trust unless he shows clearly that his desire expressed is to be controlled by the party; and that he has an option to defeat it."

Now this is really nothing more nor less than had before been laid down by his predecessors in the foregoing cases. Properly construed it embraces the three requisites of certainty as to the object of the trust—the subject-matter of the trust—and the imperative character of the trust, and this is made more clear by the observations of *Chancellor Loughborough* on the appeal.

In the same case on appeal the decision below was affirmed, the *Lord Chancellor* saying: "In *Cunliffe v. Cunliffe*, Ambl. 586, a good deal turned upon the nature of the subject devised. From the nature of the subject it could not be more than a recommendation, for he had full power to spend and waste it; the houses were sugar houses. In this case the surviving daughter could not have used any part of the property, the limitation to her issue would have tied it up."

His honor then mentioned a case in the house of lords. "A testator gave all his personal property to his daughter, and the words were extremely strong and imperative as to what should be done after her death, but a power was given her of spending part of it. From that I conceived that you must first see what interest the person to whom the recommendation is applied takes; if in express terms or by implication he has a power of spending part, or if the nature of the subject implies it, however strong the bequest is you cannot hold it an absolute trust; for that is making a will for another man. This is in effect what *Lord Thurlow* means by making the bequest certain."

The *Lord Chancellor* then expressed a desire to look

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into the cases, and subsequently declared that there was no discrepancy between *Cunliffe v. Cunliffe*, and *Pierson v. Garnet*, approved of the decisions in *Bland v. Bland*, and *Atty-Gen. v. Hall*, and in summing up thus tersely expressed the principle: "The thing is certain where the whole property must remain entire during the life of the first person—it is uncertain where any power is in that person to diminish the amount."

On the previous day the chancellor expressed the opinion that the daughter was prohibited from using any part of the property, and he again states: "Here it must have remained entire, and in the words of the recommendation it was plain it was not wholly *ad arbitrium* of the surviving daughter."

Now it is submitted that under the will of W. A. Bryan it is clear that the widow had the right to use the whole fund, and it was purely and wholly at her discretion whether anything, or if anything how much, should be left.

Now though the decision of the master of the rolls was affirmed, yet Lord Loughborough had dissented from the opinion which he had expressed that *Cunliffe v. Cunliffe* had been overruled by *Pierson v. Garnet*, and this dissent rendered it needful that he should modify some of his expressions. The occasion soon occurred.

In *Pushman v. Filliter*, 3 Ves. Jr. 7, John Pushman, after some specific legacies, thus bequeathed: "Lastly all my household goods and furniture, plate, linen, and china, ready money and securities for money, stock in trade, together with the residue and remainder of my personal estate of every nature or kind soever or wheresoever, I give, devise and bequeath unto my said wife, Mary Pushman, desiring her to provide for my daughter Anne out of the same, as long as she my said wife shall live, and at her decease to dispose of what shall be left among

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my children in such manner as she shall judge most proper."

The wife died and the bill was filed against Filliter, her executor, by the children, claiming that the residuary clause created a trust. And it was argued that it was a gift for life, remainder to the children after her death, with power to provide for one daughter for her life.

The master of the rolls, in delivering his judgment, said: "The *Lord Chancellor*, in *Malim v. Keighley*, seems to think the lord commissioners in *Cunliffe v. Cunliffe* did not intend to break in upon the rule. I cannot but think still that it is overruled by *Pierson v. Garnet*, but, however, his Lordship agreed with me; and it is now clearly settled upon *Wynne v. Hawkins*, *Pierson v. Garnet*, and the other cases, that any words or recommendation by a person having a right to command do create a trust, if the person and the property are defined, and the only question is, whether it is clear the testator intended that his wife should have no power to dispose except for the maintenance of his daughter Anne, and meant to create a trust of all the rest. Therefore it is merely a question of construction of the words 'what shall be left,' whether they mean only what shall be left after providing for his daughter Anne. I think *Wynne v. Hawkins* as strong as this. It might have been equally contended in that case that he meant all, after she had expended what was necessary for her support. In this it must be contended that if a bill had been filed, the property would have been impounded. I am clearly of opinion that I should go too far, if I did not hold that he left it in the discretion of his wife to give to his children any part she might not dispose of. . . . According to what the *Lord Chancellor* in *Malim v. Keighley* says of *Cunliffe v. Cunliffe*, if the mother could spend it, there

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is no trust, otherwise if she could not; therefore *Cunliffe v. Cunliffe* is an authority for this decision."

Perhaps the principle has nowhere been more clearly announced than by *Chief Baron Richards*, in delivering the opinion in the case of *Heneage v. Andover*, in the exchequer, and reported in 10 Price, 230 (1822).

The question arose on the will of John Walker Heneage and on this clause: "And I have devised and bequeathed the whole of my said real and personal estate hereinbefore particularly set forth unto my dear wife, *unfettered and unlimited*, in full confidence and with the firmest persuasion, that in her future disposition and distribution thereof she will distinguish the heirs of my late father by devising and bequeathing the whole of my said estate, together and entire, to such of my father's heirs as she may think best deserves her preference."

In discussing the question, his Lordship, on page 394, lays down the doctrine of the cases in these words: "It has been held, and must, I think, be admitted, that if an intention appear in any part of the will to give to the devisee a right or power to spend the property, words of equal force with these words would not be imperative; for the court in its astuteness to extract the meaning conceives it to be inconsistent with an intention to create an imperative trust, that the party should have the right or power to dispose of the property at his pleasure, and by using that privilege to any extent leave nothing or more or less to remain the subject of a trust."

"In this case the devise and the words, 'unfettered and unlimited,' which are used by the testator to show his opinion of the extent of the interest devised, are certainly large enough to manifest an intention to convey the absolute dominion to the party, as if words had been used more directly authorizing her to spend it or to deal with it as she pleased."

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This court held that there was no trust, and the decision was affirmed by the house of lords.

Now it will be observed that in this will there was the recommendation that she should devise and bequeath the whole of the said estate together and entire, but notwithstanding the court held that because the testator had declared that he had devised and bequeathed the whole of my said real and personal estate unfettered and unlimited, that these words indicated the intention of the testator that she should have the power to spend the estate, and, this being so, it was inconsistent with the imposition of an imperative trust.

Now surely there can be no doubt that by the will of William A. Bryan there was ample and complete dominion given to his widow over all his estate, real and personal, that it was wholly in her discretion as to how much of that estate she would spend—that there was no obligation imposed upon her to keep any part, and no trust can therefore be predicated.

The same principle is clearly announced in the case of *Harwood v. West*, decided by *Vice-Chancellor Sir John Leach*, in 1823, and reported in 1 Sim. & Stu. 387, and though the trust was sustained, the doctrine of the preceding cases was pointedly approved.

The case was thus: John Powell gave to his wife all his personal estate for her own sole use and benefit, relying on her, if she should marry again she would secure to herself whatever she should possess herself by virtue of his will, so that the same should not be subject to the debts of her husband; and he recommended his wife that she should by her will give and bequeath what she should die possessed of under his will, in manner following: One moiety or half part between his two sisters, or their children; and the other moiety between his wife's two sisters, or their children, and he appointed his

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wife and the defendant West, his executors. Mrs. Powell applied all but £400 of the residue, after payment of debts to her own use, and invested the £400 in stock, in the joint name of herself and West, and by her will gave of this, one half to one of the sisters of the testator, and the other half to the other sister, and made the plaintiff Harwood her executor. The executor filed his bill against West for a transfer of the stock. The *Vice-Chancellor* delivered his opinion thus: "It is essential to the execution of a trust that the subject should be certain; and if this testator intended that his wife should, at her pleasure, during her life, dispose of the property which he left to her, and that his recommendation should extend only to what, if anything, happened to remain of his property at her death undisposed of by her, then there is no trust to be administered by this court. It is true that in terms his recommendation is that she shall . . . bequeath what she shall die possessed of under and by virtue of that his will, . . . in manner as therein stated, and if these words were uncontrolled by any other part of the will, it would be to be implied that he had in view only what she should happen to have left at her death, and not all that he had given her. But in a prior part of the will he directs that upon a second marriage . . . the whole of the property which he gives to her and not such part only as may then have been undisposed of by her, shall be secured to her separate use. . . . I must therefore consider that he had in view the whole property which she should possess under his will, and that the expression is equivalent to a recommendation to give the whole property which she should so possess."

In establishing the trust the vice-chancellor keeps strictly in the line of the prior decisions in requiring certainty of the subject, and in declaring that the power of

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the wife to part with the property would reduce the request to a recommendation for the disposal of an undefined residue, and be thereby destructive of the existence of a precatory trust.

Equally emphatic is the deliverance of *Lord Langdale, M. R.*, in the leading case of *Knight v. Knight*, decided in 1839-1840, and reported in 3 Beav. 171. After quoting the provisions of the will of Richard Payne Knight, he says: "That the testator wished that his estates should be preserved in the male line of his grandfather and had a reliance, or in the popular sense a trust, that the person to whom he gave his property and those who should succeed to it would act upon and realize that wish, admits of no doubt. He has expressed his wish and his reliance in terms, which are, to that extent, sufficiently clear.

"But it is not every wish or expectation which a testator may express, nor every act which he may wish his successors to do, that can or ought to be executed or enforced in this court." And he continues, "for of late years it has frequently been admitted by judges of great eminence that by interfering in such cases the court has sometimes rather made a will for the testator than executed the testator's will according to his intention; and the observation shows the necessity of being extremely cautious in admitting any, the least, extension of the principle to be extracted from a long series of authorities in respect of which such admissions have been made."

After this salutary caution his lordship then enumerates the three essentials that had been declared necessary to the creation of a trust. "First, that the words so used must be such that upon the whole they ought to be construed as imperative. Second, that the subject of the recommendation or wish be certain. Third, that the object or persons intended to be benefited must also be

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certain." And, after illustrating his meaning by examples, he continued : " Thus the words 'free and unfettered' accompanying the strongest expressions of request were held to prevent the words of the request from being imperative. Any words by which it is expressed or from which it may be implied that the first taker may apply any part of the subject to his own use are held to prevent the subject of the gift from being certain."

The same doctrine is also illustrated and emphasized by the case of *Cowman v. Harrison*, decided by Vice-Chancellor Sir George James Turner, in 1852, and reported in 10 Hare, 234. The synopsis of the case is thus : A gift of the yearly interest, dividends, proceeds and profits to arise from the shares of the testator in a pottery, ship-building yard, shipping, trust moneys, effects and premises to his wife for her life, for the maintenance, education, and support of herself and his children ; and subject to some bequests and trusts for the advancement of the children, a bequest of the residue to the children equally ; and the testator particularly recommended, desired, and directed his wife, at her decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children, in equal shares. It was held that the attempted disposition of the savings of the widow was in the nature of a precatory gift ; but the widow having taken a beneficial interest, and being empowered to spend the whole, there was no certainty of the subject of the gift and no trust created of the savings in favor of the children ; and that the same, therefore, belongs to the estate of the widow.

After the death of the widow, a bill was filed, claiming among other things, the savings of the income of the widow, and contending that the residuary personal estate of the widow consisted of the savings during her life out

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of the rents, interest, and annual proceeds to which she became entitled during her life under the will of John Barwise, the testator, and that such savings and accumulations passed under and were subject to the trusts of his will in favor of his children.

Inasmuch as the opinion of *Vice-Chancellor* Turner is so clear, and so apposite to the present case, I will be pardoned for treating it with some particularity, and in detail.

After stating the question to be the right of the children under the will of John Barwise, to the savings of Joanna, he says: "Two views were put forward as to the effect of this clause with regard to the savings. The plaintiffs argued that it was a gift of the income to the widow, for her life, with a gift over to the children of so much as she might not spend, bringing the case within *Surman v. Surman*, 5 Madd. 123. On the other hand the defendants contended that this was a precatory gift made by means of a request imposed upon another, to whom the beneficial interest is given. The first thing to be considered is, within which class the disposition falls, which must be determined by the subject of the gift and the terms of the bequest. The subject of the gift in this case is 'savings.' The 'savings' are to be made by the widow. The amount of such savings is dependent entirely upon her. . . . He meant to give what she might save, but what she saved would depend entirely on her will and pleasure, and so far therefore as regards the subject of the bequest, it was to be the testator's gift; but whether there should ever be anything upon which it could take effect, depended upon the will and pleasure of the widow. Then what are the terms of the bequest? The widow is to dispose of it by will or otherwise. It is under her disposition that the children are to take. They take under her disposition made by the testator's desire,

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and not under any gift contained in his will. This is the very nature of a precatory gift. It is not the case of a gift to A, with a gift over of the subject to B; but it falls within the class of cases where there is a gift to A, with a request that he will bequeath it to B. I am of opinion, therefore, that this is a precatory gift. The next question is, whether, as a precatory gift, it is good. The rule as to such gifts is that there must be certainty of subject; and the foundation of that rule stands on very solid grounds. The right of a donee to spend the subject-matter of the gift is inconsistent with the nature of a trust, and the court therefore collects in that case that there can be no intention to impose a trust. . . . Independently of principle I think the authorities referred to by the defendants decide the question, and that the case falls within the class of cases in which the testator makes a gift of so much as shall be left at the decease of a person to whom he has given the use of the thing referred to."

The vice-chancellor then dismissed the bill.

Let us briefly apply these observations to the will of William A. Bryan. By that will, subject only to the payment of his debts, the testator gave to his widow, Mary R. Bryan, all his estate, real and personal, and by force of his direction to sell, the realty became converted wholly into personalty. This entire estate he gave to his wife absolutely, adding to the gift of it to her a request that if she should not require the whole of his estate as a support, she would will at her death the remainder to the children of his brother. Now there was no gift by the testator to the children of his brother Charles. Whatever they might take, if anything, was to pass to them under the will of his widow, and the subject which was thus to pass, if anything, was so much as might be left at the decease of his widow, to whom he had given

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beneficially the use of the thing referred to. Whether anything would be left, more than the widow would require, depended wholly upon her. Whether there would be any "remainder," was at her option. Whether she would save anything out of that which the testator had given to her absolutely, and which she had the right to spend, was wholly dependent upon her will and pleasure, and whether she would require the whole of his estate, was to be determined entirely by her discretion, as to how much she would spend, and with the exercise of which discretion no one had any right to interfere. There was, therefore, utter uncertainty, both as to the fact of any surplus or its amount, inasmuch as whether there would be any "remainder" to form the subject of a trust, depended wholly upon the person to whom the performance of the trust was committed, and who, under the will, had the uncontrollable right to determine whether there should be anything to which a trust could attach. Now this is inconsistent both with the imperative nature of the request and with the requisite certainty of the subject-matter, and fatal to the assumption of a trust.

Following this decision is the case of *Parnall v. Parnall*, decided by Sir Richard Malins, V. C., in 1876, and reported in 9 Ch. Div. 96.

The question arose upon the will of Edwin Parnall, which was in these words: "I give and bequeath to my wife, Ann Parnall, after the payment of my just debts, the whole of my real and personal property for her sole use and benefit. It is my wish that whatever property my wife might possess at her death be equally divided between my children."

The whole of the property was claimed by the widow absolutely, and the question was presented on demurrer, whether there was any trust for the benefit of the chil-

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dren. On behalf of the widow the cases of *Atty-Gen. v. Hall*, *Bland v. Bland*, *Wynne v. Hawkins*, and *Cowman v. Harrison* were cited and relied on. The opinion of the vice-chancellor is brief but weighty. He says: "In this case there is no precatory trust, for there is no definite gift over as there was in *Le Marchant v. Le Marchant*, and there is no obligation here for the widow to possess anything at her death. In order to create a trust, which can be carried into execution, there must be a definite subject-matter. Here the widow has a right to spend the whole of the property, and so there can be no trust affecting it. This is the principle on which all the cases cited from *Atty-Gen. v. Hall* to *Cowman v. Harrison* proceed. The case of *Harwood v. West*, cited by the other side, is really in accordance with the other cases, for there the testator's widow was, in the opinion of the court, bound to give all that the testator left her to the children after her decease." The demurrer was sustained.

Now short as is this enunciation, it contains the whole matter, as it were in a nut-shell, and is a most admirable compendium of the whole law as previously announced by his predecessors, and established by a long train of decisions.

Subsequently, and as the last of the English judgments to which I shall call attention, came the case of *Mussoorie Bank v. Raynor*, on appeal from the high court at Allahabad, and heard in privy council in 1882, and reported in 7 App. Cas. 321. It came on for the construction of the will of William Raynor, which was in these words: "I give to my dearly beloved wife, Mary Ann Raynor, the whole of my property, both real and personal, including my government promissory notes, Delhi Bank shares, my house at Ferozepore, No. 50, together with all my plate and plated ware, and whatever money,

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furniture, carriages, horses, etc., may be in my possession at the time of my decease, together with all moneys due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her." Now it will be observed that there is no other limitation to Mary Ann, the widow, than by the description of "the whole of my property, both real and personal," which of course imported the absolute gift, and there was no other power of disposal except as conferred by the words "when no longer required by her." It was contended on the one side, that the widow took an absolute interest, and, on the other, that she took affected by a trust to divide among the children.

After disposing of a preliminary question as to the propriety of hearing the appeal, *Sir Arthur Hobhouse* thus expressed the judgment of the privy council upon the main question: "Passing to the merits of the case, their lordships are of opinion that the current of decisions now prevalent for many years in the court of chancery shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by *Lord Justice James*, in the case of *Lambe v. Eames*, L. R. 6 Ch. 597, and by *Sir George Jessel*, in the case of *Re Hutchinson and Tenant*, L. R. 8 Ch. Div. 540. They are further of opinion that if the doctrine of precatory trusts were applied to the present case, it would extend far beyond the limits to which any previous case has gone. No case has been cited and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker.

"Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the

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testator must be such that the court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubt upon the intention of the testator and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words.

“In this case nothing is given over to the children of the testator except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well known and well established class of cases, have been void because of the uncertainty. It would have been void, not merely because the words of gift over were precatory only, but it would have been void, notwithstanding that the most direct and precise words of gift over might be used. Their lordships think that substantially the words ‘when no longer required by her’ must in this will be taken to have the same meaning as if he had said: ‘I give to my children so much as is not required by her.’

“Considering the nature of the property, which includes a number of articles, as to some of which the use is equivalent to the consumption—to the nature of the first

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gift which, although not expressed in terms to be an absolute gift, is quite unlimited, and is legally an absolute gift; and to the fact that the first gift is only cut down by words which do not constitute a direct gift, but are to operate through an influence upon the conscience and feelings of the wife, their lordships cannot come to any other conclusion than that the testator intended his wife to use the property according to her requirements. This is equivalent to an absolute gift to the wife."

Let us for a moment apply this decision to the will of William A. Bryan. The words in the will of Raynor were, "when no longer required by her," and the question was as to their import. In the discussion it was contended for the respondent, that the will gave to the widow the right of enjoyment for life with a power of appointment to be exercised by fair division among the children, and this argument was based upon the fact that the testator had said, "all my property," and directed her to divide "the same" when no longer required. The counsel was interrupted by *Sir Barnes Peacock*, one of the judges, who inquired of him, "whether she might not use it as required," and *Sir Arthur Hobhouse* added: "If he had given over what was not required, such gift would have been void for uncertainty." This was the crucial test, and the privy council, in its construction of the words used by the testator, arrived at the precise meaning of the language employed in the will before us. In the will of Bryan it is in terms provided that the widow may spend the entire property, for the express provision is, "if she shall not require the whole as a support,"—giving to her unlimited discretion and making it exactly equivalent to the words at which the privy council arrived, as expressing the meaning of the gift in the will of Raynor "so much as is not required by her" and which it decided to be an absolute gift to the widow, and

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as if to make the decision in all respects coincident with the present case, it further decided that though not directly expressed to be absolute, the first gift to the widow, which is in the same terms, as in the will of Bryan, was quite unlimited and legally an absolute gift.

I have thus gathered and collated the decisions of the chancery judges of England for more than a century. From first to last there is unanimity in the announcement of the principles which govern precatory trusts as exhibited in this will. There is an unbroken assent to the proposition that when in a will there has been an absolute gift and a subsequent bequest over of an unused residue, that it is void, and where the disposition over has been attempted to be made by the agency of a precatory trust, that it is equally void, and that this always occurs when the terms of the first bequest show that the person to whom it was given had the right to spend the property out of which the gift over, whether direct or precatory, was to arise.

The only change which has been made in England is the modification of the doctrine of the earlier cases in regard to the presumption with which the judges approached the subject of construction. It was at first held that words of desire and confidence had at least a quasi technical meaning and force, and *prima facie* imported a trust unless controlled by other expressions. This was unsatisfactory to many of the ablest judges. Lord Eldon said in *Wright v. Atkyns*, 1 Ves. & B. 313: "This sort of a trust is generally a surprise on the intention," and Sir Anthony Hart declared in *Sale v. Moore*, 1 Sim. 534: "The first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them." And in the case of *Heneage v. Andover*, Lord Chief Baron Richards says: "I hope to be forgiven if I entertain a strong

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doubt whether in many or perhaps in most of the cases the constructions are not adverse to the real intention of the testator. It seems to me very singular that a person who really meant to impose the obligation should use a course so circuitous and a language so inappropriate and also obscure, to express what might have been conveyed in the clearest and most usual terms—terms the most familiar to the testator himself and to the professional, or any other person who might prepare his will.”

As the result of this extensive and increasing dissatisfaction the current of judicial sentiment has changed and in modern decisions the leaning of the court has been distinctly against the establishment of precatory trusts. To *Lord Justice James* has been attributed the manifestation of the courage to perform what everybody agreed ought to be done, but which a long-established rule of construction rendered it an act of boldness to attempt. The change is in further restriction of the declaration of precatory trusts, leaving unimpaired, or rather, more strongly insisting on the essential requisites of the imperative nature of the request and the certainty of the subject-matter, or, as expressed in the case of *Mussorie Bank v. Raynor*, when it appears that “the testator intended the wife to use the property according to her requirements, it imports an absolute gift.”

Such being the doctrine of the English courts, it will be found that the American decisions are in harmony with them. Of course I cannot review or even advert to the multitudinous adjudications of forty independent jurisdictions. It will be sufficient to refer to the judgment of the highest tribunal and to a few cases which it commends. The matter was considered in the case of *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089. The question arose upon the will of Lewis Carusi, of which the material portion is in these words: “And as to all

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my property, real, personal, and mixed, after the payment of my just debts and funeral charges as aforesaid, and the payment of the legacies hereinafter mentioned, I give, devise, and bequeath the same to my brother Samuel Carusi, to be held, used, and enjoyed by him, his heirs, executors, administrators, and assignees forever, with the hope and trust however that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces, Phillippa Estelle Caulfield, Genevieve E. Carusi, and Isolina E. Carusi, daughters of my said brother ;” and then indicated the shares in which they should take.

Samuel Carusi took possession, and by his will devised all his real estate to his wife for her life, with remainder in fee to his six children instead of the three named in the will of Lewis Carusi. Isolina Howard, one of the three daughters, filed her bill in the Supreme Court of the District of Columbia, claiming that, under the will of Lewis, his brother, Samuel Carusi was a trustee. On appeal to the Supreme Court of the United States, that tribunal dealt first with the question, whether, if taken as a remainder given directly by Lewis Carusi to the three nieces it was good, and after declaring that as such it would be void, proceeded thus: “The case of complainant receives no support from the precatory words of Lewis Carusi. The words express “the hope and trust that Samuel Carusi will not diminish the same (viz., the property devised to him by the will), to a greater extent than may answer for his comfortable support, and the testator then devises to complainant and her sisters what Samuel shall not have disposed of by devise or sale. These words do not raise any trust in Samuel. He is

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not made a trustee for any purpose, and no duty in respect to the disposition of the estate is imposed on him. But even if the will had contained an express request that Samuel shall convey to the complainant so much of the estate as he did not dispose of by sale or devise, there would be no trust, for the will, as we have seen, gives Samuel Carusi the absolute power of disposition."

The judge then, after referring to *Knight v. Knight*, quoted above, and to various English decisions, cites with approbation the case of *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718. The history of this case is equally interesting and instructive. It first came before the Supreme Court of Pennsylvania in 1845, under the name of *Coates' Appeal*, and is reported in 2 Pa. 129. It arose on the will of Isaac Pennock, by which, in so far as is material, he gave, after payment of debts, to his wife "the use, benefit, and profits of my real estate, during her natural life, and also all my personal estate of every description, including ground-rents, bank stock, bonds, notes, book-debts, goods, and chattels, absolutely; having full confidence that she will leave the surplus to be divided at her decease justly among my children."

On the death of the widow, the husband of one of the children petitioned the Orphans' Court of Chester County, for a citation for a settlement of the accounts of the widow as surviving executor of the testator. The executor of the widow demurred and the court dismissed the petition. There was an appeal to the Supreme Court, and the question was, What, under the will of Isaac Pennock, was the interest of the widow in the personalty?

Rogers, J., delivered the opinion of the court, and thus fairly stated the issue: "The only question is as to the interest which the widow took in the personal estate. The petitioner contends the bequest of the personal estate was for the benefit of the wife during her life and

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in trust for her children after her death. The respondent, that she had an absolute estate in the personal property, with the right of disposing of it in her lifetime, and after her death as she might think proper. One asserts it to be a trust, the other an absolute gift."

The learned judge first laid down in general terms the proposition, that a testator manifests an intention of creating a trust if he employs precatory or recommendatory words and declared that the words in the will of Pennock were sufficient to create a trust for the children, unless they were controlled by other expressions, thus adopting in its full import the ancient English rule of technical presumption. He then adds: "It is very true that the current of decisions, of late years, has been against converting the legatee into a trustee," and having quoted at large that portion of Story's Equity in which that eminent jurist speaks with disapprobation of the principle of converting expressions of recommendation, confidence, wish, and desire into positive commands, the learned justice said: "I have made the extract of the remarks of *Mr. Justice Story* with a view of expressing my dissent." His honor then proceeds with the expression of his opinion that precatory words should be considered *prima facie* as used in an imperative and peremptory sense, and that it should be required to be shown from the context that such was not the intention of the testator. Finding himself embarrassed by the word "absolutely," he argued that it was difficult to conceive that it had more potency than the words in *Wright v. Atkins*, 17 Ves. Jr. 255, which, as he stated, "was a devise to A. and his heirs forever, and yet held, notwithstanding, to be a devise to A. of an estate for life, with a remainder in trust for the devisors heirs as *personæ designatæ*," and principally on the strength of this case ruled that Martha Pennock, the widow, took an estate for life.

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Now in the case of *Wright v. Atkyns*, the words were, "unto my dear mother, Charlotte Atkyns and her heirs forever, in the perfect confidence that after her decease she will devise the property to my family," and it is true that upon the original hearing before *Sir William Grant*, reported in 17 Ves. Jr. 255, and upon the appeal before *Lord Eldon*, in 19 Ves. Jr. 199, both held that it was a life estate in Charlotte Atkyns, yet this decree was reversed by the house of lords, and the matter of the case coming up again before *Lord Eldon* upon another application (*Turn. & R.* 154), his lordship had the candor to acknowledge his error, and to say: "Upon reconsidering this case I am perfectly satisfied that there is no ground to say that Mrs. Atkyns is only tenant for life."

It is respectfully suggested that so far as the decision that the words of the will of Isaac Pennock import a life estate in Martha Pennock, his widow, was based on the case of *Wright v. Atkyns*, it was misplaced. Being pressed by the suggestion that inasmuch as the will of Pennock provided for the bequest over of a "surplus" which necessarily implied want of certainty in the subject-matter, the learned judge says: "It is argued that when there is any uncertainty of the property to which the bequest should attach, it defeats it as a recommendatory trust."

To this proposition his honor agreed, and after admitting that *Pushman v. Filliter*, which had been cited, was decided upon proper grounds, thus proceeds: "So when the testator bequeathed to his wife the residue of his personal estate, not doubting but that she will dispose of what shall be left at her death, to his two grandchildren, it was held not to be a recommendatory trust. As there was uncertainty as to what might be left, the widow having the power to dispose of as much as she pleased, it defeats it as a trust and is an absolute gift to the wife."

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So if in this case the fair construction 'having full confidence that she will leave the surplus to be divided at her decease justly among my children,' should be that the wife had an absolute control over the whole personal estate, to do with it as she pleased,—to sell it or give it away,—and that the testator intended the remainder or residue only left at her death should be divided among her children, the uncertainty attached to the bequest will defeat it as a recommendatory trust. This is conceded ; on the other hand, if on a sound construction of the whole will the testator's intention was to bequeath to the wife the income of his estate during life, under a trust that, at her decease, it would be divided among his children,—that the word 'surplus' refers to his death, and not to the death of the wife, it must be viewed as a recommendatory trust, which a court will take care of, shall neither be defeated nor perverted."

This was narrowing the issue to the mere question, whether that which was the subject-matter of the alleged trust was the whole principal fund which had been bequeathed, or of the residue only which she might leave unexpended at her death, and having thus conceded all that is claimed as material to our purpose in the construction of the will of Bryan, he proceeds to define the meaning of the word "surplus" and construes it to mean, not what should be left at the death of the widow, but what was left at the death of the testator. He says : "She could spend the income as he directed for the good of her children, but the surplus is that which remains after paying debts and personal expenses—the capital stock—was beyond her control."

Now had this interpretation by the court of the will of Isaac Pennock been correct, then the conclusion that Martha B. Pennock, the widow and first taker, had but a life estate in the personal property, and that there was

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a trust as to the principal fund, would have been in exact accordance with the course of the decisions, because being confined, in her expenditure, to the income, and prohibited to diminish the capital, there would have been certainty of the subject-matter, there being no power in her to spend any portion of the *corpus*, it would have been a certain and ascertained sum, capable of being preserved as a trust fund.

The same will came before the court for consideration upon *McKonkey's App.*, in 1850, 13 Pa. 253. Mrs. Pennock had died leaving her will, giving something to part of the children of her husband, but making no mention of the others. The court, in the prior case, having decided that she took the estate subject to a trust, for division at her death among the children, the question here was, whether, by the will of the widow, the trust had been properly executed.

In delivering the opinion Gibson, *Ch. J.*, starts with the declaration: "The decree in *Coates' App.* settled the point that the bequest of the personal estate gave Mrs. Pennock the ownership of it for life; and that though it was expressed in words of absolute gift, they were qualified by the testator's declaration of confidence that she would leave the surplus to be divided justly among his children." His honor then admits that, "in the English courts the current of decision is beginning to set the other way; and it may be thought we ought to have fallen in with it. My own opinion is that we ought not,"—thus conceding that if the will of Pennock had been construed according to the drift of English authority, it must have received a different interpretation.

Having thus assumed the matter of construction settled and at rest, by the former decision, and that Mrs. Pennock had only an interest for life and subject to a

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trust to divide among the children, he proceeded to consider whether by her will it had been well executed. Now the thing which, by the will of Isaac Pennock, was to be divided was "the surplus," and the chief justice thus gave his definition of that word as used by the testator. He says: "The testator gave the profits of his real estate to Mrs. Pennock for life and his personal estate absolutely, having as he said full confidence that she would leave the surplus to be divided at her decease justly among his children. It is plain she was to have the use, not only of the income of the personal estate, but the estate itself as if she were the untrammelled owner of it. What other meaning can be given to the word 'absolutely?' We may not strike it out, and if he meant not to give her a right to consume both principal and proceeds he knew not what he said."

Now it is not to be controverted that *Coates' App.*, which his honor said had settled the matter of the meaning of Pennock's will, had so settled it upon the explicit statement that the word "surplus" referred to what was left at Pennock's death, and "that if the testator intended the remainder or residue only left at her death should be divided among her children, the uncertainty attached to the bequest will defeat it as a recommendatory trust," and the conclusion that it was a life estate in the widow and a trust for the children as to the principal, was placed expressly on the ground that "she could spend the income, as he directed, for the good of the children, but the surplus, or that which remains after paying debts and funeral expenses—the capital stock—was beyond her control."

Notwithstanding his construction of the word "surplus" was diametrically opposed to that of the court in *Coates' App.*, and wholly subversive of the declared reason and only ground upon which that decision was based,

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his honor continued to insist that the construction had been settled by *Coates' App.*, and that it was a trust to be executed in accordance with the will and that Mrs. Pennock was bound to give all the children something, but, that as she did not, it was therefore not well executed, and made an order of reference to ascertain the value of the surplus of Isaac Pennock's personal property unexpended at the death of the widow.

This being the legal situation and the master to whom the reference was made having reported and exceptions taken, the whole matter came again before the Supreme Court for adjudication in 1853, in *Pennock's Estate*, 20 Pa. 268, 59 Am. Dec. 718. On the one side it was contended that *Coates' App.* had been virtually overruled by *McKonkey's App.*, which decided that the widow had the right to dispose of the capital fund and that the trust existed only as to the surplus undisposed of at her death; while on the other part it was contended that *Judge Gibson* did not intend to say that the power was applicable only to the surplus remaining after the widow had disposed of what she pleased, for then the trust would have been uncertain, and it was admitted that certainty of the subject-matter was one of the requisites to the existence of a trust of this nature, and that the chief justice considering the question of construction settled by *Coates' App.* did not design to enter at all into that question.

This contention necessarily again opened up the whole matter of the will of Isaac Pennock as to the scope of the bequest to his widow.

The opinion of the court was delivered by *Justice Lowrie*, who after adverting to the fact that the will had been twice before the court and that the construction had been determined by the application of an antiquated rule which required that precatory words should "of

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themselves import a trust and that such is the proper construction of them, unless there are other expressions controlling them and showing a contrary intent;" but that the technical effect insisted on as belonging to the words had never received judicial sanction in Pennsylvania until the first opening of the cause, and that, therefore, the whole question as to their character was fairly open for consideration; he then proceeded to consider the origin and nature of such trusts under the Roman and ancient English systems, and after showing why the stringent rule of interpretation was incorporated into their jurisprudence, says: "But the rule is fading away even in England. The disrelish with which it is received by the legal and judicial minds of that country may be seen in the doctrine of extreme certainty required as to the subject and object of recommendation. . . . That it is everywhere regarded as frustrating the will of the testator. . . . If it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created."

Having cited the English cases announcing those results of the application of the old rule, he adverts to *Judge Gibson's* construction of the word "surplus," in *McKonkey's App.*, and to his opinion declaring *Mrs. Pennock* to have had the right to withdraw the principal as well as the interest for her own use as absolute owner, and to the order of reference to ascertain the value of the personal property remaining at her death as the consequence of that opinion, and says: "But it was not a legitimate consequence, as the cases last above referred to prove; for if she might apply the principal to her own use then there can be no trust and the case ought to have been dismissed, not referred. How could there

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be a trust in the legal sense of that word? No trust that is uncertain is enforced by law, because the law would have to define it, or in other words create it before enforcing it."

Now this was exactly the principle admitted to exist in relation to the creation of precatory trusts, by *Justice Rogers* in the case of *Coates' App.*, but the element of certainty in the subject-matter of the trust was supposed to have resided in the word "surplus," which the court there held to mean the residue left at the death of Isaac Pennock, and having found this it decidēd that the widow was bound to preserve this "surplus" intact,—that she had no interest except in the income for her life,—that she had no right to expend any of the principal; but as to that fund was a trustee to divide among the children under the will.

Upon the supposition that the meaning of the word "surplus" was correctly expressed by the court in *Coates' Appeal*, and that the widow was confined to the use of the income only, then the conclusion was a proper one under the application of the stringent rule of construction giving to precatory words the technical quality of imperative command, but when, in the case of *McKonkey's App.*, the same court held that the widow had the right to spend the principal of the bequest and that the word "surplus" meant only what she pleased to leave, then it became wholly uncertain and upon every recognized principle of construction applied to such trusts, the case, as said by the court in *Pennock's Estate*, "ought to have been dismissed, not referred."

Proceeding in the matter of construction, the judge discards the application of what he terms "the antiquated English rule" and after stating that the will created no trust, says: "It is not to be disputed that these views are directly opposite to those expressed by this court

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when this cause was first heard, but we cannot help it. . . . Even in the present case the opinion first declared (*Coates' App.*) adopted the old English rule in all its stringency, while the second one (*McKonkey's App.*) obviously flinched from a full application of a construction so artificial and unnatural. Such vacillations are to be expected, when an unusual rule comes to be first applied. It is well to declare at once and before any wrong is consummated by our judgment, that the rule has no foundation in any of our customs or institutions and no place in our law."

The court then announced its judgment in the following propositions:

1. "Words in a will expressive of desire, recommendation, and confidence are not words of technical, but of common parlance, and are not, *prima facie*, sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania."

2. "Such words may amount to a declaration of trust when it appears from the other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion."

3. "By this will the absolute ownership of the personal property of Mr. Pennock is given to his widow with an expression of mere expectation that she will use and dispose of it discreetly as a mother and that no trust is created thereby."

I have digested and presented these three cases at length, not only because *Pennock's Estate* was referred to by the Supreme Court of the United States with commendation, but because they furnish a complete epitome of the law applicable to the present investigation.

It will be observed that in *Howard v. Carusi*, and in

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the various discussions of the will of Isaac Pennock, the object of the search was to discover whether the first devisee had the right to spend the property so as to render nugatory the power of the law to prevent the destruction of the subject-matter of an alleged trust, or to render it uncertain from the beginning whether there would remain anything upon which the trust could operate.

It was attempted in the former case to find it in the hope and trust expressed by the testator that Samuel Carusi, his devisee, would not diminish the estate devised "to a greater extent than might be necessary for his comfortable support and maintenance;" and in *The Matter of Pennock's Will* by the declaration of the testator's "full confidence that she would leave the surplus" to his children, forms of expression which, it was argued, denoted the intention of the testator to limit the power of expenditure by the devisees and converted the gift into an estate for life, with an ulterior trust, operative by way of appointment; but as soon as it was discovered that, in the one case, Samuel Carusi had conferred upon him the capacity to expend the whole estate devised, and in the other Martha Pennock was authorized to expend the whole personalty bequeathed, the investigation came to an end and it was resolved that this power to spend the *corpus* of the bequest rendered a precatory trust impossible.

Now that which was the object of such careful scrutiny and, in *The Matter of Pennock's Will*, upon which eminent judges differed, the existence of this right to spend the fund, is, by the will of William A. Bryan, explicitly conferred. By the express terms of this will it is perfectly clear that his widow had the right to spend the whole of the estate, and this not only upon the legal intestment that an absolute interest was given by the unrestricted nature of the gift to her, but by the very

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words of the will, which it is argued create the trust, it is explicitly provided that the request is subject to the saving, "if she shall not require the whole of my estate as a support." It cannot be doubted that, if there had been no other expression which authorized her to expend the whole capital, this would have been sufficient. Now if the words relied on by the complainants shall be held to create a trust, then in the language of the cases I have cited, it was a trust incapable of enforcement, so as to preserve for the beneficiaries any part of the fund. Could any court take cognizance of the manner in which the widow was employing the capital thus unlimitedly committed to her discretion? What could be laid down as the judicial measure of being "required as a support." Would it have been permissible for the *cestuis que trust* to have filed a bill alleging that the widow was extravagantly wasting the fund and asking that it be impounded and an allowance made to her? This proposition was dealt with by the chancellor in the case of *Wynne v. Hawkins*, where the will provided "and as I shall leave behind me over and above the said legacies only sufficient for a decent maintenance for my loving wife Mary Wynne, by whose prudence and economy I have saved the greatest part of the fortune I shall die possessed of, not doubting but that she will dispose of what shall be left at her death, to our grandchildren." The bill was for an undisposed of residue after the death of the widow. Here it was as clearly expressed as in the will of Bryan, that the purpose of the testator was the decent maintenance of his widow. That, like Bryan, he was doubtful whether there would be enough and expressed his confidence, as Bryan his request, that she would will what should be left at her death—there, to "our grandchildren,"—here, "to the children of my brother Charles." Lord Thurlow dismissed the bill upon the consideration that

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no bill could have been filed restricting the wife in the use of the fund,—that the testator “meant this fortune to pass through the pleasure of his wife, leaving her to use what she pleased and consequently to make the residue such as she chose,” and, therefore, there could be no trust.

So in *Pushman v. Filliter*, which was a bill against the executor of Mary Pushman, by the children, who claimed under what they contended was a trust, the words were, after a bequest to Mary Pushman, his widow, of his personal estate: “and after her decease to dispose of what shall be left among my children, as she shall judge most proper.” The master of the rolls said: “There is only one question: whether if a bill had been filed in the wife’s life, the court would have compelled her to set apart a sufficient part for her daughter Anne, and have directed that she should have the rest for life, and that it should go over at her decease. The only question is whether she could spend any more than the interest of the property, after having provided for her daughter. . . . It must be contended that, if a bill had been filed, the property would have been impounded. I am clearly of opinion that I should go too far, if I did not hold that he left in the discretion of his wife to give to his children any part she might not dispose of.” It was held no trust.

The same suggestion was made in *Sprange v. Barnard*, where the bequest was “the sum of £300, which is now in the joint-stock annuities for his sole use, and the remaining part of what is left that he does not want for his own wants and use, to be divided, etc.”

Now it will be observed that this was the original and only bequest and is therefore much more narrowly limited, and the words “for his own wants and use,” are far more suggestive of a life estate than any words in the

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will of Bryan. It was so contended for the defendants and the court was asked to impound the property. But *Sir* Lloyd Kenyon refused, saying: "It appears to me to be a trust which would be impossible to be executed," and decreed the £300 to Sprange absolutely. Why? Because the testatrix had left it to his own judgment to determine how much he might want "for his own wants;" as here when Mr. Bryan said, after giving his entire estate to his wife in unlimited terms, "if she shall not require the whole of my estate," he left the determination of her wants to herself—and invested her with discretion to judge and decide how much she would require as a support—a discretion with which no court has any right to interfere.

So in the *Case of the Mussoorie Bank*, it was contended that the words imported the right of enjoyment by the wife for her life, with a power of appointment, to be exercised in the mode prescribed, but the privy council, construing the words "when no longer required by her" to be exactly equivalent to "so much as is not required by her," decreed that by that form of gift the bequest was made absolute. Now this is the precise expression in the will of William A. Bryan. The words "if she shall not require the whole as a support;" "so much as he may not want for his wants and use;" and "so much as is not required by him;" are manifestly equivalent, and must receive the same interpretation, unless there are some other words indicative of the testator's intention which control them. But the will under consideration starts with the most unlimited gift to the wife of his whole estate—it not only gives explicitly, to her, the right and power to spend the whole, but as if to give to her absolute immunity it sedulously provides that there shall be neither security required of her nor shall there be any appraisement, to show what might go into her

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hands. She was thus clearly indicated as the principal object of his solicitude and bounty and well knowing that he had given to her his whole estate, to be used at her discretion, he simply requests that, if she shall not have occasion to spend the whole, she will, at her death, will the remainder to the children of his brother. What remainder? Manifestly that, if any, which she might choose to leave. How is it possible that any court can exercise supervisory power over the discretion vested by words like these—or compel her to leave any residue against her own wish—or declare that to be a trust which, in judicial language, is incapable of enforcement.

It is undoubtedly true that William A. Bryan requested that, in case his widow should have more than enough for her support, she would bequeath the remainder to the children of his brother; it is probably true that he expected she would do so, but as said by *Lord Langdale* in *Knight v. Knight*: “It is not every wish or expectation which a testator may express, that can or ought to be executed or enforced as a trust” and, besides the impossibility of its enforcement so often declared by judges, as the reason for negating its existence, the imputation of an intention to burthen a legatee with a trust, while at the same time placing in his hands the means of defeating it by wasting the estate, not only imputes inconsistent purposes, but puts a premium upon extravagance, and brings about the prevention of the wish of the testator, since, if the legatee was willing to act in accordance with that wish, no trust was necessary, and if otherwise, the attempt to constrain his volition would inevitably lead to the adoption of the means to defeat it, by the destruction of anything to which it could attach.

It is therefore, on behalf of the defendant, confidently submitted, that even under the ancient stringent rule, which made the use of precatory words presumptive evi-

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dence of the intention to create a trust, the will of William A. Bryan imposed upon his widow no obligatory trust as to the bequest to her—and that much more, under the modern canon of interpretation, by which words of desire, request, or expectation are deprived of their former technical signification, and are construed according to their ordinary meaning, such bequest will be held to have been an absolute gift.

With this conclusion the law of Virginia, the domicile of the testator, is in harmony, and in support of this statement the defendant refers without comment to the cases of *May v. Joynes*, 20 Gratt. 692; *Carr v. Effinger*, 78 Va. 197; and *Cole v. Cole*, 79 Va. 251.

On behalf of the complainants no apposite and acknowledged decision of any authority has been shown, and it is submitted that none can be shown, countervailing the long line of decisions in England and in this country by which the contention of the defendant is supported.

It surely cannot be necessary to deal with citations of cases in which, where property was given expressly in trust, but the testator failed to indicate the trusts to be performed, so that it became inoperative, it was adjudged that the first taker took no beneficial interest and the property so given went to the heirs or legal distributees; or with those where the first devise or bequest was for life only, but with a power superadded by which the first taker was authorized to diminish or even spend all the property, and a gift over of so much as she might not dispose of, since it is manifest that the disposal by the first taker is not in pursuance of the nature of the original gift, but of the authority conferred by the power, which so far as it remained unexecuted, left the residue to pass under the limitation over, after the life interest expired.

Argument for complainants, in reply.

J. Alexander Fulton, for the complainants, in reply :

The learned solicitor's first three conjoint propositions, to wit, first "that where a bequest is made in terms importing an absolute gift, precatory words will never be construed as creating a trust, if either they ought not upon the whole will to be considered as imperative; or second, if the subject-matter of the bequest be uncertain; or, third, if the objects intended to be benefited be not clearly ascertained,"—may be admitted as abstract rules of construction. .

The difficulty always has been, and always will be, in their application. In the outset, who is to determine whether the terms used do or do not impart an absolute gift? Plainly the court, whenever the question is brought before it. How? By the usual methods of interpretation, to wit, by considering the words themselves, the context and the circumstances. Hence it is that the courts have over and over again declared that every case must stand upon its own merits, and be decided upon its own circumstances; and some judges have even gone to the length of saying that the decisions in prior cases can give them little aid in the construction of any will, inasmuch as the circumstances of each case are so dissimilar. But they afford the only light we have in our search for the correct rule, and they alone furnish illustrations of its judicial application.

The learned solicitor lays down and insists upon another adjunctive and dependent proposition. It is this: "If in any gift there is manifest intention to give to the devisee a right or power to dispose of the property so given, and by using such right to leave more or less or nothing, upon which the trust would operate, then such precatory words will never be construed as imperative."

This proposition can only be true in a qualified sense. As an unbending rule it is not true, and is not sustained

Argument for complainants, in reply.

even by the authorities adduced by the learned solicitor himself, as the cases cited show; and in the case now before the court it can have no application. As before observed, every case must be decided upon its own merits, and in view of its own circumstances. And here, the rule even if true in the abstract, would not avail the respondent, because "it is nowhere manifest" that the testator gave the legatee, his widow, the right or power to dispose of it absolutely at her own will and pleasure; but on the contrary, he gave her only a limited and qualified right to use it, or so much of it as might be required for her personal support. Beyond that she could not go. She could use it for no other purpose whatever; and, in order that this purpose might be carried out according to his will, she was "authorized and directed to invest it in good stocks or bonds." In view of such imperative and controlling words, how can it be contended, even with plausibility, that it was the testator's manifest intention to give her an absolute right of disposal, according to her mere will and pleasure? Such a construction would be manifestly contrary to the plain meaning of the words used and of the intent of the testator.

The learned solicitor has argued with great earnestness that where there is a "remainder," a "surplus," or a "residue," left to go to a second beneficiary, it must be the whole of the legacy given to the first taker; and if that may be increased or diminished by use, or any other contingency, the gift over fails for uncertainty. It seems to me that this is a very strained and unreasonable contention; and is entirely inconsistent with the cardinal rule of construction which seeks the intent of the testator. Were such a rule as is here contended for adopted, the intent of the testator would be defeated in nine cases out of ten, for in nine out of ten the testator designs and intends that part only shall go to the first object of his

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bounty. And the cases cited by the learned solicitor himself are in accord with, and fully sustain, this position as a careful examination will make clearly manifest. But such a rule would be as contrary to reason as authority. For what is the intent and purpose of these testamentary gifts? Is not the primary object to provide for the first taker, who always stands nearest to the testator? And how is it done? By giving him what may be necessary, in the judgment of the testator, for his comfort, support, education, or other special purpose. Then, when this is accomplished, that the "residue," "remainder" or "surplus" shall go to another, who stands a step more remote from the donor. Now is it reasonable that unless this last can get the whole, when the first has been served, he shall have none? Such a construction would not only be unreasonable, but it would, as has been already said, completely defeat the object of the gift.

I have found no authorities that sustain such a view; but in nearly all that the learned solicitor himself has cited, it is manifest that the gift over was subject to accretion or diminution, and in not a single one did the gift fail for that reason. In some of them it was plainly apparent that only a part of the gift could go over to the second taker, yet it was held good as a precatory trust, and an imperative direction. The case of *Pierson v. Garnet*, 2 Bro. Ch. 38, one of those cited by the learned solicitor, is an illustration. There Peter Pierson was to receive the whole of the residue of the interest and profits, with full benefit of any annuities that might cease during his life. He then goes on: "And from and after the death of said annuitants, I bequeath the residue to the said Peter." Could anything be plainer than that this gift might be more or less diminished or increased by the time it reached the second taker? What can be more uncertain than profits? Yet it was held a trust, and the words

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imperative. So in *Malim v. Keighley*, 2 Ves. Jr. 333, the bequest is, "in case the whole of the residue of my personal estate shall become vested in any one of my said daughters." Both the subject and the object are in some degree uncertain, yet it was held a trust.

Horwood v. West, 1 Sim. & Stu. 387, is to the same effect. There the subject was "ready money, money at interest, household furniture, stock in trade, plate, linen, china," etc. Yet this was held to be certain enough, and that the word "recommend," etc., created a trust.

So also *Knight v. Knight*, 3 Beav. 148. In this case the court says, on page 173, that, if necessary, it will ascertain what the residue is. It is true that the bill in that case was dismissed, but not because the whole residue was not given; but because it was not clear that the words were intended to be imperative; nor certain what subject was intended to be effected; nor what interests were to be enjoyed. But in the same case the rule in respect to precatory trusts is recognized; and it is added that in simple cases there is no difficulty in its application. But that was a very complicated case, and the master of the rolls says that he was inclined "at different times to different conclusions," "and that the result to which he finally arrived was attended with much doubt and hesitation." Farther on he says he could not decide whether the testator meant to include both real and personal estate; or what he got from his grandfather as well as his own acquisitions. Yet this case is relied on as supporting the complainant's contention.

The case of *Wright v. Atkyns*, 17 Ves. Jr. 255, another case cited by the respondent's solicitor, is really a strong case in our favor. The estate was large and consisted of both real and personal property, and was devised to the testator's mother and her heirs forever.

The precatory words were, "in the fullest confidence

Argument for complainants, in reply.

that after her decease, she will devise the property to my family." It was a bill filed by those claiming by virtue of the above clause, to prevent the cutting of the timber, and against the first taker during her own life. She was not absolutely restrained from cutting the timber, but was ordered to give security for the proceeds or to bring the money into court so that it might be safe for whoever should be ultimately entitled. It is worthy of note in this case there was no direction in the will to sell and invest as there is in the will now before the court; yet it was held a trust.

Our review of the English cases cited by the learned solicitor need go no farther. It will be found that all of them recognize the rule contended for by us, and that where any difficulty has arisen, it has been as to its application to the peculiar circumstances of each case; and that where it has been held that no trust arose, the facts and circumstances leading to such conclusion were materially different from those existing in the case now before the court. So true is this, that not a single case has been produced or cited, where the facts were similar to ours, that the trust was not upheld.

That the same rule prevails in this country also appears from both the text-books and the cases cited. It is not necessary to review them. They are selected from a great number of authorities, and almost at random; and include cases decided in the eastern and middle, western and southern States; and in some of them the facts are almost identical. One of them, *Harrison v. Harrison*, 2 Gratt. 1, 44 Am. Dec. 365, arose and was decided in Virginia, the State of the testator's domicile; and, upon similar facts, fully recognizes and enforces the principle contended for by these complainants. Recognizing the justice and propriety of the rule laid down by Williams on Executors, that the law of the domicile should govern

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in the construction of wills, especially in a case of doubt, if any should exist in the mind of the court, we have invoked that rule and asked it to be applied in this case. It is true that the learned solicitor has tried to break the force of that authority by citing later cases, decided by the same court, which, he alleges, if they do not overrule it, modify and qualify it. A critical examination of these later cases, and the more critical the better for us, will show first, that the case of *Harrison v. Harrison* has never been overruled or its authority questioned.

In the case of *Rhett v. Mason*, 18 Gratt. 541, cited and so largely commented on by the learned solicitor for the respondent, the court, on page 566, expressly recognizes the authority of *Harrison v. Harrison*. In the other cases cited and relied upon as weakening that authority, the facts were so varient that the rule could not be applied. Even a cursory examination of the facts will convince any one of this.

In closing my observations, which have extended very much beyond what was originally expected, but which seem necessary in view of the importance and novelty of the case now presented for the first time in this State; and in view of the very able and exhaustive argument of my very eminent and experienced brother, who has so zealously presented the other side, seemed to require, I will epitomize in a few sentences the conclusions to which I have come and which I submit for the consideration of the court:

1. That the first and principal inquiry in the construction of wills is to find out what the testator intended.
2. That when the intent is ascertained, it is the duty of the court to carry it into execution.
3. That courts of equity ought to and will use their powers and functions to do this.
4. That precatory words, such as "desire," "request,"

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“recommend,” “hope,” “expectation,” and so on, when used in a will, by one who has a right to command, are imperative in their nature and effect, and impose a trust upon the person to whom they are addressed in favor of the person to be benefited which a court of equity will execute.

5. That this has always been, and still is, the rule in England and most of the States in this Union.

6. That even in the few cases cited in this country, which seem to conflict with this old and well-established rule, it is admitted that if it appears from other expressions than the precatory words themselves, a trust was intended, it will be enforced.

7. That judged by the old and well-established rule the case now before the court is devoid of all difficulty, and is clearly with the complainants.

8. But, even if tried by what is called the new rule, the case is still with the complainants. First, because the devise or gift to Mrs. Bryan was not absolute and unqualified. No words of inheritance were used; nor executors or assigns named. It was purely personal. Secondly. She was authorized and directed to sell and to invest the money in good stocks or bonds; and for a special purpose, her support. All this proves that it was not the intention of the testator to give her the estate absolutely; and when he requests that the remainder shall go to the children of his brother Charles, the intention is still more clearly apparent; and the court is called upon to either give effect to his will by carrying out his intention, or to defeat it by defeating his intention.

THE CHANCELLOR.—An agreement between the solicitors for the plaintiffs and defendant respectively was filed in this cause before the argument thereof began, which is in the following words: “It is agreed by the so-

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licitors for the complainants and defendants respectively, in order to save costs and expenses consequent upon taking testimony, that as if upon demurrer to so much of the complainant's bill as alleges that by the will of William A. Bryan, the gift to his widow, Mary R. Bryan, was upon an obligatory trust in favor of the complainants, it shall be first argued whether any such trust was by the said will created; and if it shall be finally determined that such trust was thereby created, then the parties shall be at liberty further to proceed in the cause and take testimony in support of their respective allegations of facts and go on to hearing."

The only question for me to decide, therefore, is, Was the gift to his widow, Mary R. Bryan, by William A. Bryan upon an obligatory trust in favor of the complainants?

That gift was as follows: "I give and devise to my wife, Mary R. Bryan, all of my estate both real and personal. And I do hereby authorize and direct my executrix hereinafter named, to sell my real estate as soon as it can be sold to advantage and to invest the money in good stocks and bonds. And I do request my wife if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother, Charles A. Bryan, of Cecil County, Maryland. I do hereby constitute and appoint my wife, Mary R. Bryan, sole executrix to this my last will and testament, with the request to the court in which she may qualify that no security may be required of her and no appraisalment be made of my estate."

This is the first case, so far as I know, in respect to what is called precatory trusts, which has come before the courts of Delaware for decision. I am not therefore embarrassed by authority here upon the subject.

The tendency of modern decisions, however, is, not to

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extend the rule or practice, which from words of doubtful meaning deduces or implies a trust.

In the case of *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321, a man gave his widow the whole of his real and personal property, feeling confident "that she will act justly to our children, in dividing the same when no longer required by her." The privy council, in deciding in favor of the widow, expressed the opinion that "the current of decisions now prevalent for many years in the court of chancery shows that the doctrine of precatory trusts is not to be extended."

Lindley, *L. J.*, in a subsequent case, after quoting from the judgment in the case of *Mussoorie Bank v. Raynor*, *supra*, remarked: "I am very glad to say that the current has changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator." But I am not going to enter into any extended argument in respect to the principles involved in the case.

The principles have been fully and ably discussed by the solicitors representing the parties plaintiff and defendant. Their arguments were marked by extraordinary research and ability.

I content myself therefore by simply saying that there is no precatory trust in the will of William A. Bryan in favor of the plaintiffs.

The subject of the gift claimed as precatory was not certain. The testator, William A. Bryan, gave and devised to his wife, Mary R. Bryan, all of his estate, both real and personal, after the payment of his debts, and only requested his wife if she should not require the whole of his estate, that she should will at her death, not the property devised to her, but the remainder, to the children of his brother, Charles A. Bryan, of Cecil County, Maryland.

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There might be, or there might not be, any remainder of his estate which could be enjoyed after his wife's death by any person whomsoever. A necessary ingredient or characteristic, therefore, in a precatory devise or gift is wanting in this case. There was nothing that this court could have ordered impounded if application for that purpose had been made to it.

I must therefore decide, and I do so decide, that the gift to Mrs. Bryan was absolute and unconditional, and not upon an obligatory trust in favor of the complainants.

The bill of the complainants is therefore dismissed with costs.

Syllabus.

WILLIAM P. BIGGS, CLERK OF THE PEACE, AND *ex officio* CLERK OF THE LEVY COURT,

vs.

RICHARD G. BUCKINGHAM *et al.*

New Castle, March T. 1892.

*Plea to jurisdiction—Suit to enjoin mutilating tax list
—Power to correct list.*

1. A plea that complainant has no right to maintain his suit in any of the capacities in which he sues, does not raise the question of jurisdiction in the court to hear and determine the matters in controversy.
2. A citizen and taxpayer of a county cannot maintain a suit on behalf of himself and all other taxpayers of the county to enjoin the striking of names from the tax list on the ground that his taxes will be thereby increased.
3. A county clerk of the peace and *ex officio* clerk of the Levy Court may maintain a suit to enjoin such court from striking names from the tax list so as to make it morally and legally unjust for him to join in a certification of the mutilated list and to render him liable to heavy pecuniary penalties for furnishing and certifying duplicates thereof to the county officers for collection.
4. The power to strike from the assessment list names alleged to be unlawfully thereon is not given to the Levy Court by Del. Rev. Stat., chap. 8, §§ 9, 12, authorizing it to "correct and add to the assessments returned" and to make "additions to and corrections of the assessment list."
5. No discretion is given by implication to the Levy Court to drop from the tax list names which it may judge to be illegally thereon, by a statute prohibiting the dropping of names "legally" thereon if the law itself designates certain classes of persons whose names shall not appear on the list; but the duty of the court is ministerial to drop all names belonging to the designated class and no others.
6. The law presumes that when an assessor returns his assessment at the time and in the manner provided by law, the names there-

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on legally appear unless the law itself shows the contrary by pointing out ascertained names that are forbidden to appear thereon.

7. Express authority of the legislature is required to enable a Levy Court to judicially determine that names on a tax list are illegally there and to strike them off if they are not within any of the classes which the law itself provides shall not be on the list.
8. A county clerk of the peace who is under heavy penalties charged with the duty of placing upon the collectors' duplicates the names of taxables as returned by the assessors has such a special interest in the preservation of the lists as to be entitled to maintain an injunction suit to prevent them from being mutilated.

BILL FOR INJUNCTION.—This suit was to enjoin defendants as members of the Levy Court from striking off from the assessment lists names placed there by the assessors and alleged by the defendants to be wrongfully there.

STATEMENT BY THE CHANCELLOR.—The bill in this case is filed by William P. Biggs, in his own behalf, as a citizen and taxable duly assessed in the Hundred of St. George's, in the County of New Castle and State of Delaware, and on behalf of other taxable citizens of said county, similarly situated in respect to the matters thereafter set forth and complained of, and by the said William P. Biggs, as clerk of the peace, duly commissioned according to law in and for the said county, and by the said William P. Biggs, as clerk of the Levy Court of said county.

The bill then sets forth the names of the several assessors for the first, second, and third assessment districts of Wilmington Hundred, and the names of other persons and the hundreds in said county in which they reside, and declares that the persons so named were severally duly elected and qualified according to law to be, and

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are now, the legal assessors of the assessment districts and hundreds in which they are respectively resident.

That the said assessors on Tuesday, the second day of February, A. D. 1892, in pursuance of the laws of the said State in such case made and provided, delivered up and returned to the Levy Court of said county the assessment lists of their respective assessment districts and hundreds.

That the said Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler, and Robert Sutton are the regularly elected and duly qualified Levy Court commissioners of said county, and together constitute the Levy Court of said county.

That the said Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler and Robert Sutton (constituting the Levy Court aforesaid) have now in their control the said assessment lists so returned and delivered up as aforesaid.

That the said Levy Court commissioners since the return as aforesaid of the said assessment lists in the progress of the examination and correction of the assessments so returned by the said assessors, have already obliterated, erased, and stricken off from the said lists the names of persons appearing on the lists returned by the said assessors as taxables of the said county, and have so obliterated, erased, and stricken off the same unlawfully and without proper right, and in violation of the rights of the persons whose names have been so stricken off and in violation of the rights of the complainant as a citizen of the said county and others similarly situated as himself in respect of said act.

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The complainant states that he is credibly informed and verily believes and so avers and charges that it is the intention and the purpose of the said commissioners of the said Levy Court so constituted as aforesaid, acting upon such information as they may deem proper or expedient arbitrarily and without warrant of law to change and alter the said lists by striking off and expunging therefrom all or any such name or names as they may consider or declare not "legally" upon the lists aforesaid.

That the Levy Court commissioners aforesaid assuming as aforesaid and usurping the power unlawfully and arbitrarily to reduce the number of names upon the said lists of persons assessed as taxables, without notice to the said persons, and after the publication of their names by the assessors in accordance with the law, thereby inflict an irreparable injury, not only upon the persons whose names are so stricken from the assessment lists, but also upon the complainant as a taxpayer and contributing member of the community, and upon many others in like condition with himself, by depriving them of the benefit and assistance that would otherwise be derived from the payment of the taxes necessary for the maintenance of the government of the said county, so assessed to the persons aforesaid, whose names have been or may be unlawfully stricken off as aforesaid from the said assessment lists.

The complainant states that he is clerk of the peace of said county, and that the functions, duties, and responsibilities of his said office imposed upon him by law have already been and are about to be seriously impaired, invaded, and overthrown, greatly to the embarrassment and injury of all the citizens of the said county by the aforesaid continued unlawful and unwarranted action and conduct of the said Levy Court commissioners in

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altering and defacing the said assessment lists, so that it will be morally and legally improper and unjust for the complainant to join in the certification of the correctness and legality of said assessment lists when the same come to be delivered to the receiver of taxes as provided by law.

That the said Levy Court commissioners have already undertaken, and without warrant of law, to add to the said assessment lists at other times and places and in other modes than are provided by the laws relating to such conditions, that is to say that the said Levy Court commissioners at the date subsequent to the date fixed by law for the return of the said assessment lists have added the names of persons not personally appearing before the said Levy Court as required by law, nor vouched by such proof as is required by law, nor attested in a manner prescribed by law, whereby the said assessment lists are not such as are prescribed by law, nor proper for the legal certification by the complainant as clerk of the peace of said county, when duplicates are to be delivered to the officers charged by law with the collection and receipt of taxes of the said county.

That the complainant, as clerk of the Levy Court, is powerless to prevent the aforesaid defacement, violation of, and unlawful alteration already committed, and which are threatened and intended to be committed hereafter in the said assessment lists, with the safe keeping of which he is by law expressly and officially charged.

The complainant avers that he is without any remedy at law for the injuries and wrongs already done and committed as aforesaid by the said Levy Court commissioners and that the deprivation of the right of elective franchise and his dearest rights as a citizen, and of all other citizens similarly situated with himself, are imperiled by the action and the threatened exercise and con-

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tinued assertions of unlawful powers aforesaid by the said Levy Court commissioners and that the interposition, and equitable exercise of the restraining powers of this court are necessary to save and to prevent him and others in like situation from an irreparable injury for which no other remedy exists.

The complainant prays that the said Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler, and Robert Sutton, and each of them, may be restrained by the injunction of the court from striking from the said assessment lists as aforesaid made and returned to the said Levy Court by the said assessors, any names or name whatever appearing upon the same and returned as taxables of the said county, or from adding to the said lists any other names otherwise than at the time and place, and in the manner provided by law, in that behalf. And that by an order of this court the names of such persons as have been so as aforesaid unlawfully placed upon said lists by the authority or connivance of the said Levy Court commissioners since the return of the said lists by the said assessors shall be stricken off the said lists.

The bill also prays that the complainant may have such other and further relief as the nature of the case may require.

And that a subpoena may issue for the said Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler and Robert Sutton, as defendants in this cause.

Upon the presentation of the said bill of complaint to the chancellor, he, on the seventeenth day of February, of the present year, made an order thereon in these words:

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" And now, to wit, this seventeenth day of February, A. D. 1892, the within bill having been read and considered, it is ordered by the Chancellor that a rule be issued and served upon the defendants to show cause why the injunction prayed by said bill should not be awarded, returnable before the chancellor in the county court house, Wilmington, on Friday, the nineteenth day of February at eleven A. M. o'clock; and it is further ordered that the defendants be and they are hereby restrained until the hearing and final determination of said rule from striking from said assessment lists of the said several districts and hundreds of New Castle County aforesaid, made and returned to the said Levy Court by the said several assessors, any name or names whatsoever appearing upon the said lists and returned as taxables of the said county and from adding to the said lists any other names otherwise than at the time or times and place and in the manner provided by law.

And the subpoena will be issued as prayed by the complainant."

To the bill of complaint two answers were filed, one being the joint and several answers of Richard G. Buckingham, James H. Clark, Paul Gillis, David P. Hutchinson, John W. Jolls, and Robert B. Simpler, six of the above-named defendants on behalf of themselves, and the Levy Court of New Castle County.

In the first paragraph of said answer the said six commissioners of the Levy Court of New Castle County admit that the persons named in the first paragraph of the bill of complaint were severally duly elected and qualified according to law to be, and that they are now, the legal assessors of the assessment districts and hundreds of which they are respectively residents, as set forth in paragraph 1 of said bill of complaint.

It is also admitted in this said answer that the said

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assessors on Tuesday the second day of February, A. D. 1892, in pursuance of the laws of the State of Delaware in such cases made and provided, delivered into and returned to the Levy Court of New Castle County the assessment lists of their respective assessment districts and hundreds as set forth in paragraph 2 of said bill of complaint. But the said six defendants aver that some of the said assessment lists were not made pursuant to the laws of said State but on the contrary thereof were in large part illegal and fraudulent as thereafter set forth.

The answer of the said six defendants admits that the said Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler, and Robert Sutton are the regularly elected and duly qualified Levy Court commissioners of the said county as set forth in paragraph 3 of said bill of complaint.

The answer of these defendants further admits that the said Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler, and Robert Sutton, constituting the Levy Court aforesaid, have now in their control the said assessment lists so returned and delivered up as aforesaid, as set forth in paragraph 4 of said bill of complaint.

The said six defendants in their said joint and several answer to the bill of complaint say they do not admit but on the contrary deny the truth of the allegations contained in paragraph 5 of said bill of complaint in manner and form as the same are therein set forth. And they further deny that the said Levy Court commissioners, since the return of the said assessment lists aforesaid,

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have unlawfully or wrongfully obliterated, erased, or stricken off the names of any persons appearing on the said lists returned by the said assessors as taxables of said county.

The said six defendants aver in their said answer that whatever names have been stricken by the said Levy Court commissioners from the said assessment lists as returned as aforesaid, were names illegally placed thereon, and that the said Levy Court commissioners have not, nor have any of them, obliterated or erased any of the names so stricken from said list.

The said six defendants further say that they do not admit, but on the contrary deny, the truth of the allegations contained in paragraph 6 of said bill of complaint in manner and form as the same are therein set forth. And they further deny that it was or is the intention or purpose of the said commissioners of said Levy Court to change or alter the said lists or any of them by arbitrarily or without warrant of law striking off or expunging therefrom any name or names whatsoever appearing thereon. But the said six defendants in further answer to the allegations contained in said paragraph 6 aver that it is the purpose and intention of these defendants as constituting a majority of said Levy Court, to cause to be stricken from said assessment lists so returned as aforesaid, such names, and only such names, as the said Levy Court, while engaged in the discharge of the legal duty imposed upon it of revising and correcting said lists, shall be satisfied on due examination were unlawfully placed and do not legally appear thereon.

The defendants say they deny that the said Levy Court commissioners or any of them have or has assumed or usurped the power unlawfully and arbitrarily to reduce the number of names upon the said list of persons assessed as taxables as falsely charged in paragraph 7 of bill of complaint.

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The said defendants admit that the said William P. Biggs is clerk of the peace of said county, but they do not admit, but on the contrary say they deny, the truth of the other allegations contained in said paragraph 8 in manner and form as the same are therein set forth; and say they deny that the functions, duties, and responsibilities of the said William P. Biggs, as clerk of the peace as aforesaid, imposed upon him by law, have been or are about to be impaired, invaded, or overthrown by any action or conduct of the said Levy Court or any of the commissioners thereof; and further deny that it will be either morally or legally improper or unjust for the said William P. Biggs, clerk of the peace as aforesaid, to join in the certification of the correctness and legality of the said assessment lists as the same shall be revised and corrected by the said Levy Court when the same come to be delivered to the receiver of taxes as provided by law as falsely charged they say in paragraph 8, but on the contrary they aver that the said William P. Biggs, clerk as aforesaid, before entering upon his official duties, made solemn oath that he would faithfully and impartially perform all the duties of his said office with fidelity. And among said duties they aver is the duty expressly enjoined by the statute in that behalf that the said William P. Biggs, clerk as aforesaid, should observe the orders and rules of the said Levy Court in all things relating to the duties of his said office.

The defendants say that they do not admit, but on the contrary deny, the truth of the allegations contained in paragraph 9 of said bill of complaint in manner and form as therein set forth, but admit that after the return to the said Levy Court of said assessment lists as aforesaid one of the said assessors did, by direction of one, and only one, of the said Levy Court commissioners, add to the assessment list so returned by the assessor the names

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of two persons who had appeared before said assessor whilst sitting for the correction of errors in his said assessment, and been duly vouched for by affidavit pursuant to the statute in that behalf, the said assessor, at the time of adding the said two names as aforesaid, then having in his possession the proper vouchers for the said two persons, and the said commissioners of the Levy Court so directing said two names to be added to said assessment list, then believing that under the statute of the State of Delaware the said two names should be so added to the said list after the return thereof by the assessor as aforesaid. And the said defendants aver that upon the adding of said two names to the said assessment list, a question arose among the said Levy Court commissioners, whether said two names had been lawfully added to said list, and that thereupon several Levy Court commissioners consulted the attorney of the said Levy Court upon the subject and were advised by said attorney that said two names had been added to the said assessment list unlawfully and should be forthwith stricken from the same, and that immediately after said advice from said attorney, the said Levy Court did order and caused the said two names so added to the said list to be stricken therefrom.

And the said defendants deny that the said Levy Court commissioners have undertaken at their will and pleasure without warrant of law to add to the said assessment lists at other times or places or in other modes than are provided by the law on that behalf as is falsely charged they say in said paragraph 9 of the bill of complaint.

And the said defendants further deny that the said Levy Court commissioners or any of them save as hereinbefore stated at a date subsequent to the date fixed by law for the return of said assessment lists by the said

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assessors have or has caused to be entered upon the said assesment lists the names of any persons not personally appearing before the said Levy Court as required by law, or the names of any persons not vouched for by such proof as is required by law or attested in the manner described by law, as falsely charged they say in the said paragraph 9 of said bill of complaint.

The said defendants deny that the said Levy Court commissioners have caused or been guilty of any defacement, violation or unlawful alteration of said assessment lists, or any of them, or that the said Levy Court commissioners intend or propose at any time to cause any defacement, violation, or unlawful alteration in the said assessment lists or any of them as falsely charged they say in paragraph 10 of the bill of complaint.

They say that since Tuesday the second day of February, instant, certain reputable citizens and taxpayers of New Castle County have openly and publicly charged that a very large number of names appearing upon some of the assessment lists returned by said assessors to the said Levy Court on the said second day of February, instant, were unlawfully placed and do not legally appear upon said assessment lists, and that the said names so unlawfully placed upon said assessment lists include a large number of fictitious names placed upon the said lists in direct violation of the statute of this State on that behalf, and also a large number of names of poll taxables who were not residents of the hundreds or assessment districts, from which they were respectively returned by said assessors as assessed, placed upon said lists in direct violation of the Statute of this State on that behalf, and also a large number of names of poll taxables already assessed standing upon the assessment lists of said hundreds or districts respectively, and unlawfully placed upon said assessment lists returned on the second day of

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February, instant, as aforesaid, and also a large number of names of poll taxables unlawfully and fraudulently duplicated upon said assessment lists returned as aforesaid.

That the commissioners of the said Levy Court, recognizing that it is of paramount importance that the lists as finally revised and corrected by the said Levy Court shall be true and accurate lists and thereby serve at once to furnish a sound and reliable basis for the adjustment of the tax rate for the present year at such a percentage as shall produce adequate revenue for the government of New Castle County and to prevent the false registration of voters and the debauchery of the ballot box in said county, are now engaged in the examination of said assessment lists as so returned as aforesaid for the purpose of ascertaining whether or not names appearing upon said lists have been unlawfully placed thereon as aforesaid; and these defendants as constituting a majority of the said Levy Court propose and intend, should they be satisfied upon due examination that any names have been so unlawfully placed upon said assessment lists, so returned as aforesaid, and do not legally appear thereon, to cause the same to be stricken from said lists, not by obliteration, erasements, defacement, or mutilation of said lists or any part thereof, but by the placing of a distinguishing mark upon or opposite such names as shall be stricken from said lists.

The defendants say they deny the truth of the allegations contained in the bill of complaint that irreparable injury would be done the complainant, either as an individual taxpayer of New Castle County or as clerk of the peace thereof or as clerk of the Levy Court thereof, by striking as aforesaid from said assessment lists so returned as aforesaid all fictitious names and names unlawfully placed thereon as aforesaid.

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And the said defendants aver that should the said Levy Court, in striking any names from said assessment lists through error or mistake, cause the names of any persons which lawfully should remain upon said lists to be stricken therefrom, all such persons have, under the statute in such case made and provided, a full and adequate remedy by appearing before the said Levy Court, accompanied by some suitable voucher for their right to appear on said assessment lists.

In conclusion the defendants say that they are advised and believe that the complainant, William P. Biggs, has no right to bring and maintain this suit as a citizen taxable and resident of New Castle County, and as clerk of the peace for said county and as clerk of the Levy Court of said county, or in any of said capacities, either in his own behalf, or in behalf of other taxable citizens of said county, and they crave all benefit and advantage which they could or would obtain by demurrer, or plea in this behalf.

Andrew S. Eliason, Isaac N. Grubb, Henry D. Hickman, Samuel Kilgore, and Robert Sutton, five of the defendants, in their answer to said bill of complaint, say that they admit the allegations contained in the first paragraph of the bill of complaint to be true. They say they admit the allegations contained in the second paragraph of the bill to be true. They also admit the allegations contained in the third paragraph of the bill to be true. And they admit the allegations contained in the fourth paragraph of the bill to be true; and for further answer the said five defendants say that they believe to be true the allegations contained in the fifth and sixth paragraphs of the said bill.

And that the said Levy Court, by the vote and action of Richard G. Buckingham, James H. Clark, Paul Gillis, David P. Hutchinson, John W. Jolls, and Robert B.

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Simpler, a majority of the said Levy Court, against a protest of these five (co-defendants) contemplate and intend to obliterate and strike from the assessment lists of the several assessors as returned by them in accordance with law, a large number of names now appearing thereon, which said action the said defendants, Andrew S. Eliason, Isaac N. Grubb, Henry D. Hickman, Samuel Kilgore, and Robert Sutton are advised and informed and so believe would be illegal and without any authority of law, because as they are advised and informed and so believe the names of those legally appearing upon the said assessment lists are the names of those who are returned by the assessors, and that the said lists so returned are the lists of the assessors respectively, for the correctness of which, under the law, they are responsible. And that no power exists in the said Levy Court to vacate or revise in the manner and to the effect aforesaid the action of the said assessors.

These five defendants further answering, say, that by reason of the action and votes of the majority of the said Levy Court commissioners the time fixed by law, to wit, the nineteenth day of February last past, within which the assessment lists, alphabetically arranged, should have been according to law set up by the clerk of the peace of the said county in five of the most public places in each hundred and election district thereof, has expired, so that the notices of appeal required by law have not been given, and that no further control or supervision of the same by the Levy Court or any one else can properly or legally be exercised except in so far as the Levy Court in the manner provided by law can add to the said lists the names of such as may have been omitted. And further they answer that the allegations contained in the seventh, eighth, ninth, tenth, and eleventh paragraphs of the said bill are true, and therefore they admit the same to be true.

Argument for complainant.

Thomas F. Bayard, for the complainant:

The controlling question to be considered in the case as it stands is whether under provisions of existing law the power is lawfully invested in the Levy Court to purge the assessment lists as returned to them by the assessors of such names as they shall consider do not "legally appear upon them."

In construction of statutory powers the rule is, such power or right must be pursued in strict compliance with the terms of the statute. See Endlich, Interpretation of Statutes, § 353, and numerous cases cited.

That a literal construction has but a *prima facie* preference, and that to arrive at the real meaning it is always necessary to take a broad general view of the Act so as to get an exact conception of its aim and scope and object,—see *Id.* § 27; and the rules of *Lord Coke* in the consideration of statutes: (1) What was the law before the Act was passed? (2) What was the mischief or defect for which the law had not provided? (3) What remedy the Legislature had appointed? (4) The reason of the remedy.

It is an elementary rule that construction is to be made up from all parts of a statute put together—not from one part only by itself. Endlich, Interpretation of Statutes, § 35.

And this rule has found expression in a vast number of cases in England and the various states of this Union. See *Id.* note *b*, and cases collected.

The meaning of words may be explained or limited or expanded by the context.

It is a necessity of proper statutory construction to give effect to every word, clause, and provision of the enactment. Possibly the most important purpose of the construction of all the parts of a statute together and with reference to one another is that of giving, by the means of such comparison, a sensible and intelligent ef-

Argument for complainant.

fect to each without permitting any one to nullify any other, and to harmonize every detailed provision of the statute with the general purpose or particular design which the whole is intended to subserve. With this end in view the rule extends to acts and their amendments, which for this purpose are regarded as constituting but one enactment, so that no portion of either is to be left without effect.

A code or body of revised laws should, it is said, be regarded as a system of contemporaneous acts—as established *uno flatu*.

And in section 40 of Endlich the cases supporting these rules are cited *passim*.

All acts *in pari materia*, whether repealed or existing, may properly be considered. Endlich, Interpretation of Statutes, §§ 43–48.

With such elementary rules let the legislative history of the Levy Court be examined.

It is wholly the creation of statutes, the earliest of which was enacted in 1742. See vol. 1, Del. Laws, p. 257. And the title of the Act indicates the nature and object of the duties involved: “An Act for Raising County Rates and Levies.”

The composition of the court—of assessors, grand jurymen, and justices of the peace—indicates its general purposes.

The object for which the Levy Court was created was simply a box of tax commissioners to levy rates equitable among the population, so that none should escape from contribution to public uses, and none should be denied the opportunity to have a voice in the choice of their rulers.

The main purpose of the Levy Court was to enfranchise the citizens, and through enfranchisement to create a voluntary government and provide money by taxation for its support.

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The Levy Court was never part of the judicial system of the State, and has no mention in the constitution. No Act of Assembly, and no section, ever bestowed judicial authority, either civil or criminal.

Its powers are discretionary and sometimes judicial in their nature, as when applied to valuation, but more frequently ministerial. To guide it in matters of law, it is allowed to choose and employ legal counsel by whose opinions its decisions are attained—but who has no legal or official responsibility for the advice he may give to his clients. Its transaction of business partakes more of legislative methods, and in a very remote degree and rarely of the judicial, but its powers and jurisdiction are strictly statutory, and are to be construed according to the rule, in strict compliance with the terms of the legislative expression. In vol. 2, p. 1086, Del. Laws, A. D. 1793, the organization of the Levy Court of New Castle by eleven commissioners first was enacted and has been continued into the Revised Code of 1852, and now constitutes chapter 8, with the amendments of April, 1891. See vol. 19, Laws, p. 58.

In the fiscal government of the county the Levy Court has co-operative functions with other co-ordinate, but wholly independent, officials; of these the assessors are the most important as bearing upon the questions in controversy in this case, and are found in chapter 10 of the Revised Code and the amendatory Acts.

These assessors are freeholding citizens elected in the respective hundreds and election districts, sworn to perform the duties which are many and highly responsible, requiring integrity, intelligence, and local and personal knowledge, and set forth and described with strict care and particularity in the statutes. From none of their functions can the Levy Court absolve them, nor can they try or punish, or reward them in any way. They have

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certain defined powers of revision and correction of the assessment lists when returned by the assessors, but the independence of the two offices of each other is not lost sight of in the statutes regulating their functions.

The clerk of the peace is an officer under the constitution, appointed by the governor, who is bonded and sworn, and whose general duties are set forth in chapter 9 of Rev. Code, p. 71. By section 24 of that chapter he is made clerk of the Levy Court of the county, and his duties to the said court are contained in that section alone and his other and independent duties are found in many statutes.

Thus by the long-continued arrangement of the laws of Delaware, a distinct distribution of official powers is found, having for its object the protection of the rights of the citizen, financial and political, and their departments of power cannot be merged or their lines obliterated without the express warrant of the law.

The functions of these three separate departments—assessors, Levy Court commissioners, and clerk of the peace—provide securities for the taxpayers which cannot be denied or impaired. Thus by existing law, vol. 16, p. 302, it is made the duty of the assessor in each hundred or election district to post in at least five of the public places in each hundred or election district an alphabetical list of the persons assessed, their property and rates, etc., and in the same manner to give notice that he will attend at a certain day, time, and place “to correct errors in his assessments, and for the purpose of assessing any person who may have been omitted.” And by a subsequent section of the same Act it is made the duty of the clerk of the peace on the 20th day of February to hang up in five places the assessment list. See vol. 16, p. 302.

If these published lists are not to stand as notices that

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those persons whose names appear thereon shall be regarded as assessed, and shall not be removed therefrom, the purpose of the law in causing such publication will be wholly defeated, and the proceeding converted into a fraud upon the intending voter and taxable, and a loss inflicted upon the revenues of the county. By chapter 8 of Rev. Code, p. 62, § 9, power is given to the Levy Court to examine, correct, and add to the assessments returned by the assessors, and in section 10: "It shall be the special duty of the Levy Court to see that the principle of assessing property according to its true value is carried out and executed by the assessors, and for that purpose to correct any assessments."

Section 11 directs the Levy Court to sit on the first Tuesday in March in every year as a court of appeal, to examine the assessments returned by the assessors, and the corrections thereof and additions that may have been made, and to hear and determine appeals against the same. It is thus obvious that appeals thus reserved to taxable citizens are to be made against what appears on the lists and has been published—and to supply omissions.

Section 12 gives power to the Levy Court either upon their own examination or upon appeal to increase or diminish any assessment and to make any additions to and corrections of the assessment list; to call before them any person whose name ought to be on the assessment list and who was omitted by the assessor or by the court at its former meetings.

Section 13 gives the Levy Court power to arrange all the assessments according to right and justice so that no person may be unequally assessed or overrated in the county, etc.

Section 14 provides that no assessment list shall be liable to be called in question elsewhere than in the Levy

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Court, and the same as it shall stand in the said Levy Court shall be absolutely conclusive.

Section 15 provides that no assessment shall be made after the last day of March.

The powers above recited relate to the assessments and valuations of property and the "corrections" referred to are manifestly arithmetical and clerical but cannot be expanded into powers to strike off names and reduce the number of taxables and the taxes which are by them payable.

To argue such a power is to disregard the great purpose and intent of the law.

But in section 21 of the same chapter, pages 65 and 66 of the Revised Code, the power is given to the Levy Court to examine and settle the delinquent lists of each collector of state and county taxes, and the language is mandatory and explicit. "The name of the delinquent and if he be dead or have removed from the State shall be struck from the assessment list and also from the collector's duplicate; otherwise it shall remain on the assessment and be entered on the collector's duplicate for the succeeding year."

The words "correct" or "correction" are never employed in any of these statutes as verbal alternatives or synonyms or equivalents for the words "be struck from"—or "otherwise shall remain on."

All of these words are used in the same Act and those last referred to in a subsequent section of the Act. The power sought to be derived from the words first used can only be gained by a forced and extreme construction and dissociating from the context and subject—in connection with which they are employed—while the last quoted language is express, clear, and unambiguous and employed in limitation and control of the power now undergoing examination.

Argument for complainant.

In *Friesleben v. Shallcross*, which was decided on January 29, 1890, in the Court of Errors and Appeals in this State, it was held that, "under the legislation prior to the enactments of 1873, provision was made expressly requiring the dropping of the names of those persons who had died or had removed from the State in any year from the assessment lists of the next ensuing year. But no such provision was made for the dropping also of the names of those who had been found by the collector to be incapable of paying any tax, or to be fictitious and non-existent."

By the Act of April 9, 1873, published in Rev. Code, p. 82, it was provided by section 9 that it shall not be lawful for any assessor or any Levy Court upon the personal application of any one or otherwise to place upon the assessment in any hundred the name of any person who, having failed to pay the county tax assessed against him or her for the preceding year, was returned and allowed as a delinquent until after the expiration of the twelve months from the time such allowance as delinquent was made by the Levy Court.

And by the Act of April 10, 1873 (see Rev. Code, p. 90), it was in the first section provided, "that it shall be the duty of the Levy Court in every county (upon proof made by the collector by his affidavit, etc.), to allow said collector as delinquencies the taxes uncollected by him, and the names of such delinquents shall be dropped from the assessment list by the Levy Court and shall not be placed thereon again for a period of twelve months from and after the date of such allowance, provided that the provisions of this section shall apply to persons assessed and liable to pay poll tax." These two provisions of law stood upon the statute book until the middle of May, 1891, when they were both repealed (vol. 19, p. 78).

And they must both be read and considered as parts

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of and in connection with the Law of April 8, 1881 (vol. 16, p. 302), the said sections of the assessment laws being incorporated in that statute as published, and also section 1 of the Act of April 10, 1873, being *in pari materia* and part of the system of law in relation to the removal of names from the assessment lists.

The clear and unambiguous language thus employed conveys none but express and ministerial powers over the assessment lists, and creates no new jurisdiction of a judicial nature nor any new powers by implication.

The statute under which the present six defendants, constituting a majority of the Levy Court, allege that they find legal power to strike from the assessment lists all and every such names as they may consider do not lawfully appear thereon, is to be found at pages 304-307 of volume 16 of the Laws and in the Act of April 9, 1873, amended and printed as amended.

In section 6 of the Act it is provided, "That it shall not be lawful for the Levy Court in either of the counties of this State, or any member thereof, to take from the assessment returned to said Levy Court by any assessor the name of any person legally appearing thereon, etc." See page 306, vol. 16, Laws.

By comparing this phraseology with the Act amended (see Rev. Code, p. 83), it will be found that the only change in the amendment is the interpolation of the word "legally" before the words appearing therein. And this word "legally" is claimed by the defendants by necessary implication to create and vest in the Levy Court an unlimited power to strike off all and any names that shall in their judgment illegally appear thereon.

This word "legally" first appeared in its present context by the enactment of April 8, 1881, at which time and for ten years subsequently, the mandatory provisions of the Act of April 9, 1873, relating to the duties of as-

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sessors, and the Act of April 10, 1873, relating to the duties of collectors, and prescribing the delinquent taxables should not be placed on the assessment list and the list of ascertained delinquents whose names should be dropped from the said lists by the Levy Court, remained in force controlling the action of the assessors and the Levy Court in relation to dropping or taking the name of any person from the assessment lists.

The definite force and meaning of the word "legally" is reasonably obtained and measured by coupling it with the 9th section of the same Act expressly inhibiting "any assessor or any Levy Court from placing on the assessment list the name of any person who having failed to pay the county tax assessed against him or her for the preceding year was returned and allowed as a delinquent until after the expiration of twelve months after such allowance as delinquent was made by the Levy Court," and the cognate section 1 of the concurrent Act of April 10, 1873 (see page 90 of the Revised Code), by which it was made the express duty of the Levy Court to drop from the assessment list the delinquents returned by the collector and allowed by the Levy Court. The duties so imposed were simply ministerial, and the names so to be dropped were names ascertained by lists furnished by the collectors to the Levy Court.

These provisions were only repealed after a new system for the collection of taxes was enacted by the Legislature April 28, 1891, Laws, vol. 19, p. 58, etc., by which all connection between the Levy Court and the collection of taxes was ended, and by the substitution of a new officer called the Comptroller of New Castle County with whom all settlement of taxes by the receiver and collectors was thereafter to be made. When this new arrangement went into operation the two provisions of law to which the word "legally" had reference and application were repealed.

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To give the word "legally" the effect of creating a judicial power, summarily, and at will, without any of the methods of judicial procedure, and wholly in disregard of all the other provisions of the section of the Act in which it is found, would be to violate every rule of statutory interpretation already cited in this paper.

If its literal meaning be insisted upon, so must the literal meaning of the words with which it is associated, if an implied power be elicited, then none of the expressly described agents to execute the power can be excluded, and the implied judicial power so to strike off all names "illegally" appearing on the assessment lists returned to the Levy Court can be exercised not only by the Levy Court, but equally by "any member thereof," for the words are disjunctively used, "the Levy Court in either of the counties, or any member thereof." This result cannot be avoided if the interpretation of a grant of substantive power is to be created by implication from the presence of the word "legally," as it is found in the Act; the power must rest in those expressly indicated to exercise it, and cannot be restrained to a part of them. But it is a new and summary power which is never to be created by implication; and in the degree it is claimed by the six defendants in their answer, it would sweep away every right of any taxable citizen to qualify himself for the exercise of the elective franchise and would practically result in handing over to the Levy Court or a majority of its members the sole nomination of the electors for the County of New Castle. The functions of the assessors and the posting of their notices and lists would be an idle form, for the power would remain until the last day of March in the Levy Court to strike from the assessment lists, without hearing and notice, all such names as they should consider did not "legally appear thereon," and after that date the lists cannot be changed.

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It would in effect replace a government of laws by a government of will.

It is held by law-writers that usage should be taken into consideration in determining the meaning of a word (Endlich, Interpretation of Statutes, § 34, cited *supra*)⁶ and as the history of the proceedings in the Levy Court is of long standing, and as one of the learned counsel for the defendants, Mr. Spruance, has given his testimony to the effect that it never entered into his mind during the years he was counsel for the Levy Court to doubt the existence of the power he now claims for his clients (although he was not understood to say it had been so exercised), it may be proper to say that in the service of the Hon. George Gray, as counsel of the Levy Court for ten years, of Mr. Rodney for about the same period, and John R. Nicholson for twelve years, no such power was ever exercised, and on the contrary its existence denied and repudiated by each of them and the Levy Courts to whom they gave counsel.

The section of the statute in which the word "legally" is so found contains many minute and carefully restricted delegations of authority, no one of which asserts or is consistent with the implied grant of power now contended.

It is on the contrary in direct and irreconcilable conflict with the duty imposed by the same section upon the clerk of the peace (sec. 6, p. 306, vol. 16): "If the clerk of the peace shall neglect to place on the collector's duplicate for any hundred any name which may have been on the assessor's list for said hundred, delivered by the assessor to the clerk of the peace, he shall forfeit and pay to the person whose name shall have been so omitted the sum of ten dollars. Proceedings shall be before any justice of the peace, and the proceedings shall be in the same form as in actions for debt, and the assessor may be summoned as witness in said case, and compelled to

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exhibit the certificate of assessment from the clerk of the peace."

It is by this provision of the law made apparent that the threatened and intended exercise of power will invade, injure, and overthrow the clerk of the peace in the performance of his express duties, and subject him to heavy penalties should the list prepared and certified by him for the collecting officials be expurgated of "any names" by the Levy Court, which have been thereon when returned by the assessor.

The personal loss and injury to the clerk of the peace is thus threatened to be made ruinous if the power claimed and intended by the Levy Court be exercised by striking off names in their discretion.

To assent to such an interpretation of the word "legally" as it stands in the statute would work an implied repeal of the letter and meaning of all other statutes *in pari materia*, and strike free government at its very heart and originating process.

As to the allegation of want of proper parties to the bill of complaint made in the argument but not pleaded nor properly averred in the answer, the defendants have elected to go to hearing upon the bill of complaint and answer. They have filed no plea to the jurisdiction of this court, nor have they demurred to the bill of complaint for want of jurisdiction or for any other cause. Moreover, in open court, they have conceded in the argument of both counsel the jurisdiction of this court.

Nevertheless under the 13th article of their answer, wherein they allege that they are advised that the complainant has no right whatever as an assessed citizen and taxable of the county nor as clerk of the peace nor as clerk of the Levy Court, to bring or maintain this suit in his own behalf or in behalf of any other persons, the defendants have in this manner sought to obtain all ad-

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vantage of pleas which they have not filed and defenses which they have not set up and which they have no right under the rules and practice of courts of chancery irregularly and unjustly to introduce in argument and which therefore should be denied. See Adams, *Doctrine of Equity*, page 333 (*m*), also p. 335 (*m*).

In all cases the rule prevails that the extent to which the demurrer is meant to be a defense should be distinctly pointed out. For a demurrer cannot be good in part and bad in part, but if it be general to the whole bill and there be any part of either as to relief or discovery to which an answer is requisite, the demurrer being entire, must be overruled. And see 1 Daniel, Ch. Pr. 538-540.

Therefore not having by demurrer "distinctly pointed out" such a defense, nor having raised it by plea, or by any plea in bar or to the action, it is not competent for the defendants to convert allegations of their answer not responsive to the bill and which does not contain any of the averments requisite to a plea or demurrer to the jurisdiction into either of such defenses, and to allow the same would be inequitable and unjust.

Nevertheless while insisting against the wrong and irregularity of permitting such a defense to be so raised and considered, the complainant respectfully submits.

The present bill of complaint avers the jurisdiction and invokes the injunctive process of the court, to prevent an irreparable injury to him as a private citizen, taxable and entitled to become qualified for the exercise of the elective franchise and one of a special class of such taxable citizens threatened with irreparable injury. The bill charges and the answer admits the intention of the six defendant members of the Levy Court to assume the power to commit the acts which endanger the complainant as he has complained.

That the injury is irreparable is fully shown by an

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examination of the constitution and laws. Nor do the six defendants aver that any adequate or impartial remedy exists in any other court.

The threatened action of the six members being unauthorized by law and prejudicial to interests of the complainant and others in similar condition with him, a multiplicity of suits will be avoided by equitable relief, which is one of the heads of equity jurisdiction.

The complainant as clerk of the peace is especially and individually injured in his office and the enjoyment and usufruct thereof by his being subjected to severe pecuniary penalties if he should be compelled by the unlawful proceedings intended by the six defendants to abate or make default in his legal duties under the statute requiring him, under penalty, to omit no names from the assessment lists as returned by the assessors, in the duplicates he is required, as clerk of the peace, by law to certify and transmit to the officers charged with the collection of taxes; nor can he plead in his defense, in proceedings against him for such penalties, the unlawful orders or proceedings of the said Levy Court.

The complainant also as clerk of the Levy Court is individually and specially threatened with injury by the said proposed and intended actions of the said six members of the Levy Court, because he is morally and legally bound by law to perform official duties which will be invaded, impaired, and overthrown, and thereby great loss and irreparable injury will be inflicted on him, unless the said Levy Court shall be restrained by the injunction of this court.

The defense of want of jurisdiction should have been raised by demurrer, or by special plea. See 1 Dan. Ch. Pr. p. 608, and *American notes* and authorities there cited.

It is a rule that the Court of Chancery being a superior court of general jurisdiction nothing shall be intended to be out of its jurisdiction which is not shown to be so.

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It is requisite in a plea to the jurisdiction of the court both to allege that the court has no jurisdiction and to show by what means it has been deprived of it. 1 Dan. Ch. Pr. 716 (*m*), and authorities cited.

And it is necessary to show what court has jurisdiction, and if the plea omits to set forth these particulars it is bad in form, and the plea to the jurisdiction must also show that the jurisdiction alleged to be entitled to exclusive cognizance of the suit is able to give a complete remedy. *Fox v. Wharton*, 5 Del. Ch. 210.

In Massachusetts and many other States the courts have not a general jurisdiction in equity. Dan. Ch. Pr. p. 609 (*m*), and cases cited.

It was decided in an elaborate review of the origin and history of the Court of Chancery in Delaware by the present chancellor, that it was a superior court of general jurisdiction, with all the powers of the High Court of Chancery of Great Britain.

That the court has undoubted jurisdiction to interfere by injunction where public officers are proceeding illegally or improperly under a claim to do any act injurious to the rights of others, — see *Cooper v. Alden*, Harr. Ch. 72, edited with *notes* by Thomas M. Cooley; see p. 91, and cases cited.

The case of *Cooper v. Alden* was brought by the private citizens in their own names, and not by the State upon their relation to obtain relief by injunction in chancery against public official commissioner of internal improvement.

That a private party may maintain a bill for an injunction who shows individual damage and may sue in his own name, see *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 492, 17 L. ed. 314. *Per Curiam*: “He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others, who are or may be

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injured ; nor is there more necessity for joining with his partners in the prosecution than there is for his joining in the suit of any other person, as complainant, who has sustained injury." And the court remarks, a bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in chancery prosecuted on behalf of the Crown, to abate or enjoin a nuisance as a preventive remedy.

That a court of chancery has an undoubted jurisdiction to interfere by injunction where public officers under claim of right are proceeding illegally or improperly to injure or destroy the property of an individual, or where it is necessary to prevent a multiplicity of suits, see *Mohawk & H. R. Co. v. Archer*, 6 Paige, 88, 3 L. ed. 910; *Livingston v. Livingston*, 6 Johns. Ch. 497, 2 L. ed. 196, 10 Am. Dec. 353. See also 3 Wait, Act. & Def. p. 700, and authorities cited.

"Trespass will now be enjoined in all cases where from the nature of the trespass, or from the circumstances of the parties, the remedy will not be full and adequate."

That a court of equity will not only interfere to restrain acts prejudicial to the interests of the community upon the information of the attorney-general, but also upon the application of private parties directly affected, aside from and independent of general injury to the public, see 3 Wait, Act. & Def. p. 707, and numerous authorities cited.

And where a bill in equity sets forth various claims and the defendant files a general demurrer, the demurrer will be overruled if any of the claims be proper for the jurisdiction of the court of equity. See 1 Dan. Ch. Pr. p. 608.

The State of Delaware has no statutes regulating the applications for remedies against the illegal and injurious acts of public officers.

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As sustaining the right of the complainant to maintain this suit in the Court of Chancery, see also 1 High, Inj. §§ 796, 797, 801, 804, 822.

It is conceded that if the complainant be one of a class of persons who would sustain especial damages from the apprehended wrong, he may properly maintain this suit, and it being one of the heads of chancery jurisdiction to prevent a multiplicity of suits, it follows that the more extensive the class, the greater the multiplicity of suits to be prevented. Therefore, as the class of citizens to which the complainant belongs, *i. e.*, the assessed taxable citizens of the county who have the right to qualify themselves to exercise the elective franchise, comprises about 17,000 individuals, the reason for arresting an intended violation of a right or privilege so important to this large class is especially impressive.

And see latest edition of High on Injunctions, chapter on Taxation, sustaining the right of one or more taxpayers to maintain such an action as the present. *Christopher v. New York*, 13 Barb. 571.

Charles B. Lore, also for the complainant :

There are two material charges in the bill of complaint. The first is the unlawful putting on or adding to of names.

The answer practically disposes of that question, of the adding of names to the list.

The other charge made in the bill of complaint we apprehend is a substantial one and the one upon which this case turns.

Our charge is that defendants propose to strike from the list names under the guise of the word "legally." Their answer to that charge in the bill is that they propose to strike off names illegally appearing.

They distinctly claim the right and the power in their discretion to strike off names that they may judge are not legally placed thereon.

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The 11th section of the answer of the respondents in this case raises the precise issue to be argued before this court, that is whether there is vested in the Levy Court, or a majority of the Levy Court, which is the Levy Court, in a certain sense, to strike off from that assessment list any names in their discretion other than those that are expressly provided by law if there be such.

We apprehend that the whole contention upon this point turns upon the Law of 1873, and as modified or amended by the Act of 1881, and perhaps it would be well enough for us to read that law.

Under the Act of Assembly passed April 9, 1873, as amended by Act of April 8, 1881 (vol. 16, Del. Laws, p. 306, § 6), it is provided as follows: "Be it further enacted as aforesaid, that it shall not be lawful for the Levy Court in either of the counties of this State, or any member thereof, to take from the assessment returned to the said Levy Court by any assessor, the name of any person *legally* appearing thereon; nor shall it be lawful for such Levy Court, or any member thereof, to add to any assessment returned as aforesaid the name of any person, unless the party himself personally appears before the Levy Court, accompanied by some respectable freeholder of the county, who shall make oath or affirmation in the form prescribed in section 3 of this Act; said oath or affirmation shall be made in open court before the clerk of the peace, who alone is authorized to take an oath or affirmation for that purpose, and it shall be unlawful for the Levy Court to accept the oath or affirmation of any one taken before any other person than the clerk of the peace of the county in which the party applies for assessment; and an application made in any other manner than prescribed above shall be refused. It shall be lawful for the Levy Court to propound to the affiant such questions as they may deem proper concern-

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ing his knowledge of the applicant, and if he should refuse to answer, they may reject the said oath or affirmation, and further that the Levy Court shall be the judges of the respectability of the affiant, and may reject the affidavit or affirmation of any person upon that ground : Provided, that persons regularly assessed in any hundred may, as under existing law, be transferred to any other hundred in the same county. Every member of the Levy Court of either of the counties of this State who shall violate the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall forfeit and pay a fine of not less than one hundred dollars nor more than five hundred dollars for every such offense. If the clerk of the peace shall neglect to place on the collector's duplicate for any hundred any name which may have been on the assessor's list for said hundred, delivered by the assessor to the clerk of the peace, he shall forfeit and pay to the person whose name shall have been so omitted the sum of ten dollars. Proceedings shall be before any justice of the peace, and the proceedings shall be in the same form as in actions for debt, and the assessor may be summoned as witness in said case and compelled to exhibit the certificate of assessment from the clerk of the peace."

Under this section it is claimed by a majority of the Levy Court, that they may in their pleasure strike off of the assessment lists returned to them by the respective assessors of this county on the first Tuesday of the present month, the names of any persons which they may think fictitious, the names of nonresidents and duplicate names; that this power is arbitrarily vested in them and may be exercised at any time before the first day of April, 1892. The extent of the power claimed is that they are the judges of what names shall be stricken off and that they can so strike off at their pleasure within the time named.

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The Act of 1873 (vol. 14, p. 343, § 6), provides "that it shall not be lawful for the Levy Court, in either of the counties of this State, or any member thereof, to take from the assessment returned to the Levy Court by any assessor the name of any person appearing thereon."

The Act of 1881 (vol. 16, p. 306, § 6), amended the section by the insertion of the word "legally" so that it reads that the Levy Court are forbidden from striking off of such assessment the "name of any person legally appearing thereon."

It is contended by the majority of the Levy Court that the insertion of the word "legally" in this section clothes them with the extraordinary power and discretion of striking off names at their pleasure.

To understand this grave question properly, it will be wise for us to consider the purpose and history of the assessment lists, and of the functions, powers, and duties of the assessors, the Levy Court, the clerk of the peace, and of the collectors with respect to them.

The purpose of the assessment is twofold: (1) to form a basis of equitable taxation for the purpose of raising revenue for the support of the government. (2) it is a qualification for the exercise of the elective franchise. Section 1, article 4, of the Constitution of the State requires of the elector that he shall have, "within two years next before the election, paid a county tax which shall have been assessed at least six months before the election."

Involving, therefore, as they do, the right of the citizen to have a voice in making the laws under which he lives, the Legislature has carefully and jealously guarded the making, the alterations, and the custody of the assessment lists.

How carefully this has been done will appear from the laws applying to the persons who are clothed with any authority in respect to them.

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Assessors.—These lists are made by an assessor who is elected by the people; he must be a freeholder in and an inhabitant of his election district (Code, p. 112, §§ 1–3), must not be a Levy Court commissioner, county treasurer, trustee of the poor, inspector, coroner, sheriff, member of the Legislature (Code, p. 82, § 20). Before entering upon his duties he is sworn by the Levy Court to make the assessment “fairly and impartially” (Code, p. 81, § 19).

It is his sworn duty to canvass his district, and fairly assess all taxable property and every taxable person, and to complete the assessment by the first day of January in each year (Code, p. 81, § 16).

Within ten days thereafter he must post in at least five of the most public places in his district an alphabetical list of the persons assessed, and at the same time, place and manner, giving notice that he will attend at the place of holding the general election in his district on a day named and such other days as may be necessary, from ten o'clock A. M. to five o'clock P. M., to correct errors and assess the names of any persons omitted (Del. Laws, vol. 16, p. 304, § 2).

At such times additions can be made on the affidavit of a respectable freeholder of the county, made before the assessor only, upon his appearance with the taxable, setting forth the identity, age, and residence of the omitted taxable, which affidavit the assessor shall return to the clerk of the peace (Del. Laws, vol. 16, p. 305, § 3). Such name, so vouched for, the assessor must put on list under penalty of from one hundred dollars to five hundred dollars. (Del. Laws, vol. 16, p. 305, § 4).

Any person who shall procure or cause to be put on the assessment list any name not entitled to be assessed, or a fictitious or fraudulent name, shall be guilty of misdemeanor, and fined from one hundred to five hundred dollars. (Del. Laws, vol. 16, p. 306, § 7.)

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The assessor must return the assessment list so corrected by him to the Levy Court on the first Tuesday of February each year (Code, p. 81, § 17), under his certificates (Code, p. 85, §§ 3, 4), which are then to be kept by the clerk of the peace, who is the custodian of books and papers of court. (Code, p. 75, § 24.)

Clerk of the Peace.—After the assessment lists have been so returned to the Levy Court, and it has made the corrections and additions thereto which it deems just and proper, the clerk of the peace shall on or before the 20th day of February each year post in five of the most public places of each election district copies of the assessment with such corrections and additions, with notice of the day of holding Court of Appeals, which is the first Tuesday in March. (Code, p. 76, § 27.) On or before the first Tuesday of April in each year he also transcribes duplicates of the assessment lists for the collectors, and certifies to the correctness of the same. (Code, p. 64, § 18.)

It is expressly provided that “if the clerk of the peace shall neglect to place on the collector’s duplicate for any hundred any name which may have been on the assessor’s list for said hundred, delivered by the assessor to the clerk of the peace, he shall forfeit and pay to the person whose name shall have been so omitted the sum of ten dollars. (Del. Laws, vol. 16, p. 306, § 6.)

Levy Court.—Under the amended Code of 1874 and subsequent statutes, from the first Tuesday in February until the last day of March, the assessments are in the custody of the Levy Court for corrections and additions and transfers in pursuance of law.

At the February meeting the Levy Court may “examine, correct, and add to the assessments returned by the assessors.” (Code, p. 62, § 9.)

At the March session they, upon their own examina-

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tion, or upon appeal, have the power "to increase or diminish any assessment and to make additions to and corrections of the assessment list." (Code, p. 62, § 12.)

The Levy Court can only add to the list the names of persons who shall appear before them in open court personally with "some respectable freeholder" as a voucher, who shall make the affidavit required by law, and even when so vouched for he may be rejected, as the Levy Court is expressly clothed with authority to judge of and to reject the oath. (Vol. 16, p. 306, § 6.)

Nowhere in the code or in the subsequent statutes now in force is the authority directly given to the Levy Court to strike from the assessment list the name of a person duly returned therein by the assessor. Nor is any method designated by which such steps may be effected.

If such power exists, it must be implied from the use of the word "legally" in the Act of April 9, 1873, amended by Act of April 8, 1881. (Vol. 16, p. 306, § 6.)

1. Such an implication is in the teeth of the legislation of the hundred years of our existence.

The first legislation on this point in our printed laws is the Act of February 9, 1796, where it is provided that "the commissioners of the Levy Court and Court of Appeals may, at their discretion, order any person's name to be struck off the levy list, that shall request it." (Vol. 2, p. 1262, § 32.)

This exact language is re-enacted in Act of January 19, 1797. (Vol. 2, p. 1329, § 8.)

The Act of February 4, 1825, which repealed most of the Act of January 19, 1797, left section 8 still in force, and it remained so until the Code of 1829 was compiled by *Judge Hall*. In this Code, section 8 of the Act of January 19, 1797, is published with the power to strike off names omitted. (Code 1829, p. 390, § 8.)

Under the Code of 1852 the Levy Court had authority

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to strike from the assessment list, also from the collector's duplicate, the names of delinquents returned by the collector of taxes under oath, who were dead or had removed from the State; all others were to be entered on the collector's duplicate for the succeeding year. (Code 1852, p. 15, § 21; Code 1874, p. 65, § 21.)

By the Act of April 9, 1873, the Levy Court was absolutely prohibited from striking from the list returned to them the name of any person appearing thereon (vol. 14, p. 306, § 6), and the law so continued until the amendment of April 8, 1881, which added the word "legally," and made the section "any person legally appearing thereon," instead of "any person appearing thereon."

So that from the formation of our government there has been given to the Levy Court no express authority to strike a name from the assessment list returned by the assessor, except at the request of the person assessed, or on the sworn return of the collector showing delinquents, then in all cases the manner is specifically prescribed and set forth in the statutes. Nothing is left to implication but the duty and power of the Levy Court is explicitly limited and defined.

In the face of such circumspection on the part of the Legislature in limiting the power of striking names from the list, it would be an immeasurable stretch, even of the imagination, to construe the word "legally" in the Amendment of 1881, as conferring on the Levy Court such extraordinary power.

2. The Act of April 8, 1881, on its face negatives the implication of such a grant of power to the Levy Court.

The striking of the name of an elector from the assessment list is as important an exercise of power as adding a name thereto, and the Legislature would naturally be as explicit in the one case as in the other.

By section 6 of the Act (vol. 16, p. 306), where a

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name is to be added to the list by the Levy Court, the applicant must appear personally in open court with his freehold voucher. The voucher must be sworn before the clerk of the peace only, and then it is "lawful for the Levy Court to propound to the affiant such questions as they may deem proper concerning his knowledge of the applicant, and if he should refuse to answer they may reject the said oath or affirmation, and further that the Levy Court shall be the judges of the respectability of the affiant and may reject the affidavit or affirmation of any person on that ground." Here the authority to judge is expressly conferred and the methods and means of using that great power are specifically provided and prescribed.

Yet under the contention of the respondents, the more dangerous power to strike names from the assessment list is conferred by the use of the word "legally" appearing thereon, without any express judicial authority, without any limitation of that power, and without any means by which it could be carried into execution, so that you must not only imply the power to strike off, but also the authority to judge, and all the means necessary to carry the same into effect.

Surely the absence of any express grant and provisions for striking off names, in the same section where the power to add names is so fully conferred in detail, is a violent presumption against any such intent on the part of the Legislature.

Again, by same section 6 the Levy Court is expressly clothed with judicial power as to adding names to the list. They may refuse to add the name of a person so claiming, and if they err they cannot be punished for the exercise of that judicial power.

They are not clothed with such express judicial power in the claimed authority to strike off names, and if, in

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the exercise of their best judgment, they should strike off a name wrongfully they are guilty of a misdemeanor and punishable by a fine of one hundred to five hundred dollars.

We therefore would have the anomaly of an implied judicial power in the Levy Court to strike off names in their discretion, and yet incriminate and punish them if they make a mistake even in the use of their best judgment.

3. But an unanswerable argument against the implication of such a grant is found in the nature of the power claimed. If it exist at all it may be exercised by the Levy Court in their discretion up to and including the last day of March when the lists are finished and may not be altered or corrected in any respect; even in the last hour of the last day names may be stricken off as many and in such manner as the Levy Court may choose. Persons so stricken off would have no remedy and no redress; their names cannot be restored to the lists because it is then finally settled and the guilt of a misdemeanor and a fine of five hundred dollars awaits any one who shall add to or take from the list as so finally settled (Code, p. 63, §§ 14-16). Under the contention of the respondents the Levy Court would be acting judicially and could not be punished for any error.

Here you would have a citizen deprived of his most cherished right, by implication of law, and left absolutely without remedy or redress.

A startling consequence of such a construction of the use of the word "legally" in said section 6 would be that it practically annuls all the provisions of law for a fair and just assessment. What use is it for the assessor to canvass his district, faithfully assess all persons liable, to put his lists in five of the most public places in his district, to sit at the place of holding general elections for the correction and additions to his list, to return the

Argument for complainant.

same to the Levy Court for correction and addition, for the clerk of the peace to post the lists so corrected, and for persons to appear both before assessor and Levy Court and have lists corrected, if on the last day of March the Levy Court in its sovereign discretion may strike from the lists such names as it may please? With this power the whole fabric tumbles, and the legislature in a moment of "idiotic simplicity" has wiped out the whole assessment system with its machinery and guards for the protection of the citizen. Such a contention is so monstrous that I can think of no language so fitted to designate such construction of the word "legal" as that it is merely a clinging to the bark and perpetrating a huge legal quibble and opening a veritable Pandora box of evil to the people. Certainly it has no savor of equity, and is in strictness purely technical.

4. If the word "legally" has any significance at all it relates only to such persons as the sworn returns of the collectors show are delinquents,—whom the Act of April 10, 1873 (vol. 14, p. 346, § 1), says "shall be dropped from the assessment list by the Levy Court and shall not be placed therein again for a period of twelve months after the date of such allowance." In that view it has no significance whatever since the repeal of sections 9 and 10 of the Act of April 9, 1873, by Act of May 13, 1891 (vol. 19, p. 78, § 1), which abolishes the delinquent list, and under the Five Commissioners Act (vol. 19, p. 63, § 8), all poll tax not paid by the first day of May next following the issue of the duplicates will be extinguished.

It must be borne in mind that the Levy Court is of limited jurisdiction, created by the Legislature; it has no judicial functions or authority except such as are expressly conferred, or necessarily implied.

In this view, what possible reason can be found for

Argument for defendants.

clothing the Levy Court with such dangerous and unlimited power, dangerous in the hands of the purest and best, and in the hands of designing and corrupt men simply subversive of our dearest rights.

W. C. Spruance, for six of the defendants constituting a majority of the Levy Court of New Castle County:

This cause is heard upon bill and answer without replication or testimony.

If the plaintiff instead of replying to the defendant's answer sets down his case for hearing on bill and answer, the defendant is at liberty to read his answer as evidence in his favor in his own case, and the decree is made on the assumption that all the facts stated by the defendant are true. 1 Smith, Ch. Pr. 339; 2 Dan. Ch. Pr. p. 998.

We have thus eliminated from this case all disputed questions of fact and all allegations in the bill relative to the conduct of the Levy Court in the past, and all fraudulent purpose as to the future exercise of the powers claimed.

All fraudulent or unfair intent is denied in the answer, and must be accepted as true. Neither fraud nor carelessness in their proposed future actions can be presumed.

The only question before the court is whether it will enjoin the defendants from the careful, conscientious, and faithful exercise of the powers which we claim legally belong to them; and which we claim it is their duty to exercise.

Nor have we anything to do with any of the allegations in the bill in reference to the putting of names upon the assessment list, since the answer not merely denies any irregularity in that regard in the past, but declares the purpose to put no names upon the assessment list except in accordance with the plain directions of the statute, as to which there is no contention.

Argument for defendants.

It should also be understood that the defendants do not claim for the Levy Court the right to make any change in the assessment lists made in former years as they stand in the court.

The question presented to your honor now is solely in reference to the rights of the Levy Court in respect to annual assessment lists returned this present year and which alone are during the months of February and March before the Levy Court for examination and correction.

But little light is thrown upon the subject by the examination of colonial statutes or later statutes down to the Code of 1852.

Section 32 of the Act of 1796 (2 Del. Laws, p. 1262), which declares that every freeman above the age of twenty-one shall be rated for a poll tax, and declares that the Levy Court commissioners "may at their discretion order any person's name to be struck from the levy list that shall request it," clearly means no more than this : That a person too poor to pay a poll tax might apply to the Levy Court to have his name stricken from the list so that he might thereafter live, as he might sue in this court upon proper application *in forma pauperis*.

This provision of the law, however, furnishes no light upon the questions now in controversy.

The statutes in force for many years down to the Act of April 9, 1873, have a most important bearing upon the subject now under consideration.

Down to the time of the passage of this Act it was, so far as I can learn, never questioned that the Levy Court, not merely by virtue of its general powers, but by express statutory provisions, had full power, not merely upon appeal, but upon their own examination, to correct and make additions to the assessment lists as returned by the assessors both in respect to persons and property.

Argument for defendants.

I was myself counsel for the Levy Court of New Castle County from 1859 for about ten or eleven years, and I never heard the right of the Levy Court in this regard questioned; and I believe it to be true that during that time the Levy Court habitually exercised the right and duty not merely to add to said lists the names of such persons as had been improperly omitted, but to strike from the lists the names not properly appearing thereon, as for example, names duplicated on said lists; names which already stood upon the lists in former years as settled and then remaining in the Levy Court, and all fictitious names, and names of persons not resident in the hundred for which they were returned.

The following are some of the statutory provisions upon this subject found in the Revised Codes of 1852 and 1874.

Chapter 8, section 9.—“At the same meeting (February) they may examine, correct, and add to the assessments returned by the assessors. . . .”

Section 12. “They shall have power, either upon their own examination or upon appeal, to increase or diminish any assessment, and to make additions to and corrections of the assessment lists; to call before them any person whose name ought to be on the assessment lists, and who was omitted by the assessor or by the court at its former meetings, and to fix the poll assessment and make a valuation of property of said persons. . . .”

Section 13. “The said Levy Court shall have power to arrange all the assessments according to right and justice.”

Section 14. “An assessment list shall not be liable to be called in question elsewhere than in the Levy Court, and the same, as it shall stand in said court, shall be absolutely conclusive.”

Section 16. “If any person shall fraudulently add to

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or take from the said assessments as finally settled by the Levy Court, he shall be deemed guilty of a misdemeanor. . . .”

Chapter 9, section 27. “After the Levy Court shall have examined the returns made by the assessors and made the corrections and additions thereto which they deemed just and proper, he (the clerk of the peace) shall make, and on or before the twentieth day of February, in each year set up . . . an alphabetical list of the names of persons with their respective assessments taken from the assessment list of such hundred or election district as the same shall stand after such corrections and additions with notice of the day of holding the court of appeal. . . .”

Chapter 11, section 4. “The return of the assessors in the different hundreds in the State with such corrections as the Levy Court shall make, shall be a part of the assessment list of said hundred, and shall be conclusive.”

Under these provisions of law as they existed prior to the Act of 1873, the right of the Levy Court to strike from the lists returned by the assessors fictitious names, duplicated names, names of persons already assessed, names of persons not resident in the hundred or district, was unquestioned and unquestionable.

The right thus given to the Levy Court was not merely to correct errors in names, but to make additions to and corrections of the assessment lists.

It may be fairly inferred from the provisions found in the Act of 1873 that it had theretofore been the habit of the Levy Court to exercise the powers which we now claim it had the right to, both as to the adding of names and the taking of names from the assessment lists as returned by the assessors, since we find by an examination of the Act of 1873 that its provisions were in a large degree directed to the defining and curtailing the powers of the Levy Court in this regard.

Argument for defendants.

This Act prescribed with greater precision the duty of assessors in making assessments, provided a penalty for his refusal or omission to place upon the assessment the name of any person personally appearing before him and vouched for as prescribed by the Act, and for his knowingly placing on the list any fictitious name, or the name of a person not at the time resident of the hundred or district, forbade the assessors and Levy Court to place upon the assessment the name of any person, who having failed to pay the tax assessed against him for the preceding year, had been returned and allowed as delinquent, until the expiration of twelve months from such allowance as delinquent.

Section 6 prohibited the Levy Court from taking from the assessment list returned by any assessor the name of any person appearing thereon, and forbade them to add to any assessment list so returned the name of any person except upon his personal appearance and proof as required by the Act, transfers excepted.

This section curtailed the powers of the Levy Court materially; and while it might be contended that it did not prohibit the removal of fictitious names which would not be the names of persons, it might have been dangerous for them to strike off any name, even though fictitious, appearing upon the lists returned by the assessors.

Whatever may have been the purpose of this provision it became in its operation an invitation to assessors for partisan purposes to pad the lists with fictitious names, duplicated names, names of nonresidents, and names of persons already assessed; and it is notorious that during the period that this provision was in force this invitation to fraud was freely accepted by unscrupulous assessors.

This evil was to a great degree remedied by the Act of April 8, 1881 (16 Del. Laws, 302), which among other amendments of the Act of 1873 struck out all after the

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word "that" in the first line of section 6 and before the word "provided" in the tenth line of said section, and inserted in lieu thereof, among other things, the following: "It shall not be lawful for the Levy Court in either of the counties of this State, or any member thereof, to take from the assessment returned to the said Levy Court by any assessor, the name of any person legally appearing thereon;" and prescribed the mode by which the Levy Court might add to any assessment returned as aforesaid the name of any person.

The question now before the court is: What was the effect of the Act of 1881 in striking out the prohibition against taking from said lists "the name of any person appearing thereon" and the substitution of a provision which merely prohibited them from taking from said list "the name of any person legally appearing thereon?"

What names could and what could not legally appear upon a list returned by an assessor in a year as this is of an annual assessment?

The classes of persons whom the assessor should or could place upon his annual assessment list for poll taxes were defined and prescribed by chapter 11, section 3, of the Revised Code, and were and are as follows: "(1) Those who have arrived at twenty-one years of age since the preceding assessment; (2) those who have come to reside in the hundred or district; and (3) those who have been omitted from prior assessment.

This provision of the law has by no subsequent legislation either been repealed or altered in any manner.

The names of persons other than those to be found in one of these classes could not legally appear upon an assessor's annual list.

The methods by which the assessors should proceed in reference to these classes of persons have been by subsequent legislation changed and defined, and penalties pre-

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scribed for violation of duty by the assessor, but these classes have always remained the same.

None of the provisions of law to which I have referred, namely, Rev. Code, chap. 8, §§ 9, 12, 13, 14, 16; chap. 9, § 27; chap. 11, § 4, conferring express power upon the Levy Court, either upon their own examination or appeal to make additions to and corrections of assessment lists returned by the assessors,—have been repealed by subsequent legislation, and they stand in full force to-day, except so far as those powers may have been modified by subsequent legislation.

And it is incumbent upon our opponents to show by what statutes and to what degree the powers enjoyed by the Levy Court under the above-mentioned provisions of the Revised Code have been modified or qualified.

The restrictions of the Act of 1873 upon the power of the Levy Court as to the adding of names remains substantially the same under the Act of 1881, but the substitution for the prohibition against taking from said lists the name of any person appearing thereon in the Act of 1873 of the prohibition against taking from said lists the name of any person legally appearing thereon, has resulted in an enlargement of the powers of the Levy Court and a restoration to them of the powers which they enjoyed in this regard under the before-mentioned provisions of the Revised Code.

Before the Act of 1873, under the express and implied powers of the Levy Court then existing, they certainly had no right to take from the lists returned by the assessors "the name of any person legally appearing thereon," and if they had done so it would have been an illegal act and in violation of their oaths of office, although there was no express penalty for their so doing.

The Amendment of 1881, while it expressly forbids the taking from the lists "the name of any person legally

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appearing thereon," and prescribes a penalty for so doing, does not make the Act more illegal that it would have been under the Acts in force prior to the Act of 1873.

The limiting of the prohibition to "the name of any person legally appearing thereon" implies that they should thereafter have the right to take from said lists the name of any person not legally appearing thereon; and if there were no other provisions of law which expressly or impliedly gave this power to the Levy Court, the Amendment of 1881 by fair implication conferred this power upon the Levy Court.

But the Act of 1881 did more; it took away the modifications under the Act of 1873 of the powers of the Levy Court in respect to the taking off of names under prior and unrepealed statutes, and all such statutes thereafter were in full force and effect in that regard.

If we are right in the contention that the Levy Court, under the statutes in force prior to 1873, had the right to take from the lists as returned by the assessors the names of persons not legally appearing thereon, they have now that right by virtue of the Act of 1881 under the statutes in force prior to 1873.

It is not to be presumed that the Legislature made the Amendment of 1881 without any intention whatever. It is manifest that they intended to make a change in the unqualified prohibition in the Act of 1873 which forbade the Levy Court to take from said lists the name of any person appearing thereon.

If such was not the intention of the Amendment of 1881, what was its intention? Why was there any change made in the Act of 1873 in this regard?

Manifestly the Legislature considered that the prohibition against taking off the name of any person appearing thereon was too broad and was dangerous in its effects, and that the prohibition should be made in respect only to taking off names not legally appearing thereon.

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It is a rule of construction that a statute must be construed so as to give effect to the intention of the Legislature. If the contention of our opponents is to be sustained, then we must conclude that the Legislature in this regard made no change whatever in the law, and that what they did was without any intention whatever.

It is claimed that the only class of names to which this provision of the Act of 1881 applies is to persons returned as delinquents who by the 9th section of the Act of 1873 were forbidden to be placed upon the assessment list for twelve months after the time of their allowance as delinquents; but the same Act by forbidding the placing upon the assessment list of sundry other classes of persons, and prescribing penalties for so doing, make it equally illegal to place such persons upon the lists; as for example said Act forbids under penalty the assessor to place upon the list the name of any poll taxable unless the assessor shall be satisfied from personal knowledge that such person is of lawful age and *bona fide* resident in the hundred or district, except such as shall personally appear before him and prove in the manner prescribed by the Act that he is entitled to be placed thereon.

Section 3 forbids him under penalty to place upon the list any fictitious name or the name of any person not at the time a resident of his hundred or district.

Section 7 forbids any person under a penalty to cause to be placed upon the list of any hundred or district the name of a person not entitled to be assessed in said hundred or district, or any fictitious or fraudulent name.

The placing upon the list of any name by either of these provisions forbidden to be placed upon the list was equally illegal as the placing thereon of delinquents mentioned in section 9 of the Act. But section 9 of said Act was repealed by the Act of 1891 and there is now left according to the contention of our opponents nothing

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upon which the Amendment of 1881 can now operate, and that as the law now stands all names which may appear upon said lists whether they be of persons already assessed, of persons who do not live in the hundred or district, of persons appearing many times on said list, or of wholly fictitious persons, appear on said list legally, and cannot by any power be removed therefrom.

The Act of 1881 was not, as is contended on behalf of the complainant, a restrictive Act, but strictly construed it was an enlarging Act. The Act of 1873 forbade the taking off of any names appearing thereon. The Amendment of 1881 was in effect an Enlarging Act in that it diminished the prohibition and made it applicable only to those legally appearing thereon.

The provision of section 6 of the Act of 1873 which was not in express terms repealed or changed by the Amendment of 1881 which prescribes a penalty for the clerk of the peace neglecting "to place on the collector's duplicate for any hundred any name which may have been on the assessor's list of said hundred, delivered by the assessor to the clerk of the peace," is claimed by our opponents as proving conclusively that the Levy Court do not possess the power to remove any names from said list however illegally placed thereon.

They admit of course that while section 9 of said Act stood, the clerk of the peace had no right to place upon the collector's duplicate any name which had been allowed as delinquent, although such name may have been on the assessor's list; but the language of this recited provision, read literally, absolutely forbids the clerk of the peace to neglect placing on the collector's duplicate any name which may have been on the assessor's list, and makes in terms no exception whatever. But of course no such cast-iron construction should have been given to this provision and certainly not since the Amendment of 1881.

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This provision of the Act of 1873 may in one sense be said to have there a proper place and meaning, as that Act forbade the Levy Court in the exercise of their supervisory power over the list or otherwise taking from the list the name of any person appearing thereon; but when that provision is found remaining as a part of section 6 as amended in 1881, it must be read and construed in reference to the main purpose of the amendment and the general scope and purpose of the Act as amended, which was so far as related to the taking of names from the list to prohibit only the taking off of names legally appearing thereon. If not so construed this provision as to the clerk of the peace would defeat the very object and purpose of the amendment, but this cannot be allowed.

We must by the proper rules of construction make, if we can, the whole Act harmonious and consistent and not defeat its plain and main purpose by a minor provision which read literally may appear inconsistent.

If this provision is to be taken literally, from the passage of the Act of 1873 to the passage of the Act of 1891, it was the duty of the clerk of the peace to put upon the collector's duplicate names found upon the list returned by the assessors, which within twelve months had been allowed as delinquents. If taken literally the clerk of the peace would have been obliged to put on the duplicate names which by a third party, and without the knowledge of the assessor, might have been illegally added to it after its completion by him and before its return to the Levy Court, and thus defeat the action of the Levy Court, however wisely and legally exercised in taking from said lists names not legally appearing thereon.

It is contended, on the other side, that the effect of the Acts of 1873 and 1881 in adding any safeguards in

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the putting on of names by assessors, and the Levy Court, implies a denial of the right of taking off. It appears to us that the inference to be drawn from these provisions is an intention to secure true lists, which would be impossible if there is nowhere the power to take off names which are false or fraudulent.

The Levy Court is a governing body of limited jurisdiction and has only such powers as are either conferred expressly or arising by proper and necessary implication from other powers expressly conferred, or from the constitution and the purposes for which the body was created; but within their legitimate bounds in the honest and faithful exercise of the powers which the law has conferred upon them they have a discretion which cannot be interfered with or enjoined by this court.

The answer declares that it is the purpose of the defendants to exercise the power and discretion which lawfully belongs to them fairly and impartially, and we must take this to be true.

In purging the lists of names not lawfully appearing thereon, not only would the Levy Court be exercising the powers which the law confers upon them, but there would be no serious difficulty in so doing.

Although not learned in the law we may presume that the average Levy Court commissioner has as much intelligence and capacity for reaching a just conclusion as the average referee or juryman. And it is upon the determination of juries that we depend for the settlement of the most ordinary as well as the most difficult questions of fact in controversy between the citizen and the State, as well as between citizen and citizen.

In the exercise of their power and duty "either on examination or on appeal" to correct the assessment lists the law has clothed them with full powers. They may summon before them and examine under oath the assess-

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ors or any other persons. The assessor when so examined cannot plead ignorance.

By the Act of 1873 as amended by the Act of 1881, the assessor is not allowed to place on his list any person for poll tax only except such as he shall be satisfied from personal knowledge is of lawful age and is a *bona fide* resident of the hundred or district, except such as apply in person, and furnish proof of their identity, age, and residence by affidavit in writing, which affidavit is to be returned with his list.

If a name appears upon the assessment lists which is claimed to be fictitious, the assessor can be called upon to indicate the place of his residence, or if it was placed upon the list upon personal appearance and affidavit, the affidavit and voucher can be produced and the voucher himself summoned before the court. And by this and similar methods the Levy Court may proceed speedily and with certainty to ascertain whether any and what names do not legally appear upon said lists.

It would be difficult to exaggerate the inconvenience and danger which must arise if this power is denied to the Levy Court.

Our opponents tender themselves ready to join us in purging these lists if, as is claimed, some of them are padded with unlawful names.

We are glad to accept their offer of co-operation and ask them how they propose to purge these lists if the Levy Court cannot do it as we propose. To this inquiry we have no answer. We know no other method; if the Levy Court cannot take off fictitious and fraudulent names, duplicated names, names of persons not entitled to be thereon, we do not know and our opponents have not told us, how this may be done.

The collector upon whose duplicate must go all fictitious names and duplicated names, if the claim of our

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opponents is correct, may, as has been decided by the courts of this State, not require the personal appearance and payment by the alleged taxable, but he may in his discretion hand over to any person who will produce the money regular receipts for the taxes of all such fictitious or fraudulent names.

If these names not lawfully appearing upon these lists cannot be removed therefrom by the Levy Court the most hopeless confusion and uncertainty must ensue in laying the taxes for the coming year and for the years to follow until the next general assessment. But of vastly more importance is the consequence sure to follow of frauds against the right of suffrage.

Of what consequence is it that every man lawfully entitled to vote shall vote if a sufficient number of those not entitled to vote shall be allowed to vote and thus overcome the will of the lawful electors?

"We call the attention of the court to the fact that both the prayer for injunction and the restraining order issued in this cause calls upon the defendants to refrain not merely from taking from the lists returned by the assessors any name lawfully appearing thereon in accordance with the provisions of the Act of 1881, but in accordance with the repealed provision of the Act of 1873 restrains the defendants from taking from said lists any name whatever appearing thereon, which is not now and has not been since the Act of 1881 in accordance with the laws of this State."

The thirteenth paragraph of the answer denies the right of the complainant to bring or maintain this suit as a citizen taxable and resident of New Castle County, as clerk of the peace, clerk of the Levy Court, or in any of said capacities, either in his own behalf or in behalf of other taxables, citizens of said county.

"Where, however, the bill is filed on behalf of private

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citizens to restrain a public nuisance, they must show some special and peculiar injury sustained by themselves, independent of and distinct from the common and general injury shared by the public alike, in default of which equity will not interfere." High, Inj. § 755.

"Where the act which it is sought to enjoin is one which affects the interest of the public at large, proceedings for an injunction are usually brought, both in England and in the United States, in the name of the people, or of the attorney-general at the instance of a relator." High, Inj. § 747; *Baines v. Baker*, Ambl. 158.

This was a bill for an injunction to stay building a hospital for people infected with the small-pox in cold bath fields very near the homes of several tenants of the plaintiffs. The lord chancellor says: "Bills of this sort are founded on being a nuisance at common law. If a public nuisance, it should be on information in the name of the attorney-general, and it would be for his consideration whether he should file such an information or not." In conclusion the lord chancellor says: "I am of the opinion I should not be justified in granting the injunction which is now prayed, and therefore must deny the motion."

In *Crowder v. Tinkler*, 19 Ves. Jr. 622, the court says: "Upon the question of jurisdiction, if the subject was represented as a mere public nuisance, I could not interfere in this case, as the attorney-general is not a party; and, if he was a party, upon the *dicta*, unless it was clearly a public nuisance, generally, the court would not interpose by injunction, until it had been tried at law." *Davis v. New York*, 14 N. Y. 526, 67 Am. Dec. 186; *People v. Vanderbilt*, 28 N. Y. 397, 84 Am. Dec. 351.

Putnam v. Valentine, 5 Ohio, 187, was a bill brought for injunction by the surveyors of a public road to prevent obstructing the same. Held, by the court, that suits

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to prevent the infraction of rights purely public are generally brought and conducted in the name of the State, or the officer entrusted with the conduct of public suits.

And again, the individual complainant has no such interest or connection with the subject of this bill as to entitle him as such to the relief prayed for.

It follows that the injunction asked cannot be granted on this application.

Miller v. Grandy, 13 Mich. 540, was a case of a bill for injunction by a citizen and taxable against a board of county commissioners corresponding, as I understand, with our Levy Court, to restrain them from appropriating and expending money for the payment of bounties, etc., during the late war. Held, that the complainant in his capacity as a citizen and taxable had no right to maintain such a suit, and that it should have been brought in the name of the attorney-general or the State upon the relation of some proper person. Injunction refused.

I state the decision in this case from my recollection, as I have not now the volume before me.

In all similar cases in this State, of which I have any knowledge, the proceeding has been instituted either in the name of the State upon the relation, etc., or in the name of the attorney-general upon the relation, etc.

I remember an information filed by me shortly after *Chancellor Bates* came upon the bench in the case of John B. Pennington, attorney-general, upon the relation of Sharp, Stotsenberg, and others, citizens and taxpayers, etc., against the City Council of Wilmington, to restrain them from the expenditure of money and the incurring of debt for the purpose of public park lands without warrant of law.

All cases of mandamus and quo warranto relating to similar subjects have been brought in like manner.

If the complainant has a special and particular interest

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in the subject-matter of the suit over and above the common interest of other citizens, taxpayers and voters, he may maintain a bill.

We fail to see that in either of these capacities, or in his capacity of clerk of the peace and *ex officio* clerk of the Levy Court, he has any special right, or that he is in any special danger.

Nothing will be required of him except the performance of those duties which the law enjoins upon him, and the obedience of those orders of the Levy Court which he is sworn to obey.

For these reasons we ask that the bill be dismissed.

Edward G. Bradford, also on behalf of the six defendants constituting the majority of the Levy Court:

This case having been heard on bill and answer, all allegations of fact contained in the answer are admitted to be true and only such allegations of fact in the bill as are not controverted by those in the answer are taken to be true; all the other allegations of fact in the bill being taken to be untrue.

All of the facts, then, which can be considered by the chancellor are those set forth in paragraphs 6 and 11 of the answer.

The question thus presented is simply whether this court has power and jurisdiction to interfere with the action of the Levy Court in striking off of the lists returned by the assessors fictitious names or other names illegally appearing thereon.

The Levy Court has sole jurisdiction and power in the premises and in the absence of fraud on its part there is no jurisdiction or power in the Court of Chancery to interfere with the action of said Levy Court.

High says: "No principle of equity jurisprudence is better established, than that courts of equity will not sit in review of the proceedings of subordinate political or

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municipal tribunals, and that where matters are left to the discretion of such bodies the exercise of that discretion in good faith is conclusive, and will not, in the absence of fraud, be disturbed." High, Inj. § 785.

And again, the same author says: "Equity will not interfere by injunction for the purpose of controlling the action of public officers constituting inferior quasi judicial tribunals, such as boards of supervisors, commissioners of highways, and the like, on matters properly pertaining to their jurisdiction, nor will it review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law, by writ of certiorari." High, Inj. § 797.

In *Moore v. Smedley*, 6 Johns. Ch. 28, 2 L. ed. 43, cited in note 2, § 797, of High on Injunctions, Chancellor Kent says: "I cannot find by any statute, or precedent, or practice, that it belongs to the jurisdiction of chancery as a court of equity, to review or control the determination of the supervisors in their examination and allowance of accounts and causing the money to be raised. . . . The review and correction of all errors, mistakes, and abuses in the exercise of the powers of subordinate public jurisdictions and in the official acts of public officers belongs to the Supreme Court. . . . It has always been a matter of legal and never a matter of equitable cognizance."

Under the statutes of the State of Delaware not only is the settlement of the assessment lists committed to the Levy Court, but the law expressly declares that "an assessment list shall not be liable to be called in question elsewhere than in the Levy Court; and the same, as it shall stand in said court, shall be absolutely conclusive." Rev. Code, chap. 8, p. 63, § 14.

It is therefore clear that the Court of Chancery has not the power to interfere with the action of the Levy

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Court in matters pertaining to its jurisdiction, such as the settlement of the assessment lists, in the absence of fraud on the part of the latter body.

Upon the admitted facts the Levy Court has the right to do what it proposes.

It is the purpose and intention of the Levy Court to strike off of the lists returned by the assessors only such names as the Levy Court shall on due examination ascertain to be fictitious or otherwise illegally placed on said lists.

This the Levy Court not only by the general nature and purpose of its being, but also by direct statutory authority, has the right to do.

The Levy Court is a quasi judicial body with large discretionary powers charged with the raising and expenditure of the county revenue.

The raising of the revenue involves the making of an assessment of polls and property, and the adjustment of the tax rate by the Levy Court requires a true and reliable assessment.

The assessors primarily in point of time engage in the work of assessment and return their lists to the Levy Court; but the process of assessment is not complete until the assessment lists so returned pass through the Levy Court receiving its examination, revision, and correction, and the addition by it to the lists of names of such persons as should have appeared but were omitted therefrom.

The assessment lists as so settled by the Levy Court by the last day of March of the year in which the assessors make their returns, are final and conclusive, save as to the right of appeal in certain cases not affecting the discussion of the present case.

Upon these lists as so settled the Levy Court adjusts the tax rate at such a percentage as will be sufficient to produce the requisite amount of public revenue.

Argument for defendants.

The proposition advanced by the counsel for the complainant is virtually that if an assessor places fifty thousand fictitious names, by way of illustration, upon the assessment list returned by him to the Levy Court that body would be utterly without power to strike these names from the list and remedy the fraud. And if the Levy Court cannot strike these fraudulent names from the lists there is no power in any human tribunal to do so.

If the contention of the other side be sound our legislation upon the subject is a reproach to our age and civilization.

And it is confidently submitted that such contention is unwarranted by the law.

For the purpose of ascertaining the authority of the Levy Court to strike off from the lists as returned by the assessors fictitious names and other names illegally placed thereon it is highly important to consider the condition of the old law, and by old law is meant the law as it existed prior to the Act of April 9, 1873.

Under the old law there could be no reasonable doubt of the power of the Levy Court to do what it now proposes; and notwithstanding the assertion of the counsel for the complainant to the contrary, it was the practice of the levy courts of the different counties in settling the assessment lists returned to them to strike off names illegally appearing thereon.

The law clearly recognized that it was the Levy Court and not the assessor that had the final settlement and determination of the assessment lists.

The counsel for the complainant have argued the case apparently upon the assumption that the assessor is the superior of the Levy Court; and that if fraud is to be apprehended it is to be looked for on the part of the Levy Court rather than the assessor.

The law does not presume that any public officer sworn

Argument for defendants.

to fidelity will be derelict in his duty, whether he be an assessor or a member of the Levy Court.

But the Levy Court has higher authority and more extensive power than the assessor.

It is the revisory, corrective, and appellate tribunal and performs the final functions of the assessment machinery, of which the assessor is but a part.

Section 4, chap. 11, page 85, Rev. Code, provides that, "the return of the assessors in the different hundreds in the State with such corrections as the Levy Court shall make, shall be a part of the assessment list of said hundred, and shall be conclusive."

Section 14, chap. 8, page 63, Rev. Code, provides that, "an assessment list shall not be liable to be called in question elsewhere than in the Levy Court; and the same, as it shall stand in said court, shall be absolutely conclusive."

Section 16, chap. 8, page 63, Rev. Code, provides that, "if any person shall fraudulently add to or take from the said assessment, as finally settled by the Levy Court, he shall be deemed guilty of a misdemeanor, and shall be fined five hundred dollars."

While the assessor is an officer chosen by the people and clothed with his appropriate functions, he is nevertheless in the discharge of those functions, subject to the superior power of the Levy Court in the settlement of the assessment lists, for the purpose of furnishing a reliable basis for the adjustment of the tax rate.

The law recognized that the assessor was liable to commit errors and mistakes, for it provided that before he should return his assessment list to the Levy Court he should sit "to correct any errors therein, or for the purpose of assessing persons omitted." Rev. Code, chap. 10, p. 81, § 16.

And this duty of sitting for the correction of errors

Argument for defendants.

in his assessment list, or the addition of names thereto, is devolved upon the assessor under existing law. Del. Laws, chap. 320, p. 304, § 2.

It has not been contended by the counsel for the complainant that the assessor, after hanging up his list in the month of January, and before making return thereof to the Levy Court on the first Tuesday of February of the same year, would not have the power to strike therefrom any fictitious names, or any other names illegally placed thereon. Yet in so doing he would be exercising only the power of correcting his list.

But it is contended that after his list is once returned to the Levy Court, it is absolutely final, so far as the striking of illegal names therefrom is concerned.

It is the duty of the assessor to return his assessment to the Levy Court on the first Tuesday of February, and to attend the Levy Court on that day, on the first Tuesday of March, and on such other days as the Levy Court may require, under a penalty. Rev. Code, chap. 10, p. 81, § 17.

After the assessor makes his return to the Levy Court on the first Tuesday of February, the Levy Court, as the revisory, corrective, and superior power, examines, corrects, and adds to the list as returned by the assessor, and in the discharge of that function can require the assistance of the assessor. Rev. Code, chap. 8, p. 62, § 9.

And in the month of March the Levy Court, either upon its own examination or upon appeal, was expressly authorized "to increase or diminish any assessment, and to make additions to and corrections of the assessment list; to call before them any person whose name ought to be on the assessment list, and who was omitted by the assessor or by the court at its former meetings." Rev. Code, chap. 8, p. 63, § 12.

It is a monstrous proposition that the Levy Court,

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clothed with this power, had not the right, for the purpose of settling a true basis for the adjustment of the tax rate, to strike from the list required to be submitted to it for its revision and correction fictitious names and other names illegally placed thereon.

When the assessor makes his return to the Levy Court, on the first Tuesday of February, his primary functions of assessment cease, and the revisory and corrective functions of the Levy Court come into play.

That the Levy Court had the right to strike from the lists fictitious and illegal names, resulted from the general scope of the functions of that body, and from the power expressly conferred upon it to examine and correct the lists.

The Levy Court was empowered to add names to a list perfect in itself so far as it extended, and to correct lists in so far as they were imperfect and illegal.

No one questions the right of the Levy Court, in case John Smith was assessed by the assessor as Thomas Smith, to strike out the name "Thomas," and insert the name "John." Yet this is identically the same in principle with striking from the list a fictitious name. The Levy Court had the right to strike out the name "Thomas" and insert the name "John," in order that there should appear on the assessment list the name of a person who should be assessed with and pay a tax. And in striking out the name "Thomas," it dropped from the list just so much of a name as was fictitious and did not represent a person from whom a tax could be collected. Upon precisely the same ground it had the right to strike out a wholly fictitious name as not representing any taxable.

To contend that under an express power conferred upon the Levy Court to correct the lists as returned by the assessor, it is not authorized to strike therefrom ficti-

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tious names and names of persons illegally placed thereon, is manifestly taking too narrow a view of the power conferred upon the Levy Court to adjust and settle the assessment lists in such manner as to serve as a reliable basis for the adjustment of the tax rate.

This will be made further apparent by consideration of the functions and limitations upon the power of the assessor under the law in making an annual assessment, the assessment of 1892 being an annual, and not a general, assessment.

Section 2, chap. 11, page 85, Rev. Code, provided that the general assessment "shall stand and be acted on for four years."

Section 3 of the same chapter, page 85, Rev. Code, contains a proviso that "each assessor shall annually assess the persons of those liable, who have arrived at twenty-one years of age since the preceding assessment, or who have come to reside in the hundred, or who have been before omitted."

Thus the power and authority of the assessor in making an annual assessment, aside from property, are strictly limited to assessing three classes of persons: (1) persons who have arrived at twenty-one years of age since the preceding assessment; (2) persons who have come to reside in the hundred; (3) persons who have been before omitted.

The old law therefore as it now remains in force excludes and expressly negatives any legal power in the assessor to place fictitious names upon his list, for they do not represent persons; or to place upon his list the names of any persons who do not reside in the hundred, or, under existing law, the assessment district, for they have not come to reside in the hundred or assessment district; or to place upon his list the names of any persons already duly assessed, for such persons have not

Argument for defendants.

been omitted; or to duplicate upon his list any names, for the same reason.

Such being the law the Levy Court under its express power of correcting the lists clearly had the right to strike therefrom any and all such names, to the end that the assessment list as finally settled should furnish a reliable basis of taxation.

It has not been denied by the counsel for the complainant that the assessor after completing his assessment by the first Tuesday in January and hanging up his list within ten days thereafter as required by law, and before returning his list on the first Tuesday in February had and has the right to correct the names appearing thereon and to strike fictitious names therefrom and other names illegally appearing thereon.

Yet this right on the part of the assessor is included in his express power "to correct any errors therein or for the purpose of assessing persons omitted," as set forth in section 16, chapter 10, page 81, Revised Code.

If, then, the assessor under the power to correct errors in his assessment list had and has the right to strike fictitious names therefrom as well as other names illegally appearing thereon, the Levy Court necessarily has equal power to strike from the list as returned by the assessor on the first Tuesday of February fictitious names and other names illegally appearing thereon; for it is authorized by section 9, and section 12, chapter 8, Revised Code, either upon its own examination or upon appeal "to make additions to and corrections of the assessment list and to call before them any persons whose names ought to be on the assessment list and who were omitted by the assessor or by the court at its former meetings."

The power conferred upon the Levy Court over the list as returned by the assessor being identical in substance and form with the power conferred upon the assessor over his own list before returning it to the Levy

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Court on the first Tuesday in February, there can be no justification for a denial to the Levy Court of the authority to strike from the list fictitious names and other names illegally appearing thereon.

Several statutory enactments passed, during the last century which authorized the Levy Court upon the application of the poll taxable to strike his name from the list, were referred to by the counsel for the complainant in support of their contention; and it was argued by them that as that power formerly existed and had since been abolished there is now no authority in the Levy Court to strike names from the list. But the statutory enactments referred to have no conceivable application to the present case for the reason that they dealt solely with legal assessments of poll taxables who desired to be relieved from the payment of a tax, and not illegal assessments by way of fictitious names or names unlawfully appearing on the list.

Thus up to the passage of the Act of April 9, 1873 (page 82, Revised Code), there could be no question that the Levy Court had full authority under its power of correction to strike from the assessment list when returned fictitious names and other names unlawfully appearing thereon.

But by section 6 of the Act of April 9, 1873 (page 83, Revised Code), it was provided that "it shall not be lawful for the Levy Court, in either of the counties of this State, or any member thereof, to take from the assessments returned to the said Levy Court by any assessor, the name of any person appearing thereon; . . . and if the clerk of the peace shall neglect to place on the collector's duplicate for any hundred any name which may have been on the assessor's list for said hundred, delivered by the assessor to the clerk of the peace, he shall forfeit and pay to the person whose name shall have been so omitted the sum of ten dollars."

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The Act of April 9, 1873, was a clear legislative recognition of the right of the Levy Court prior to its enactment to strike names from the list under its power of correction; otherwise there could have been no necessity or reason that the Legislature should declare that the Levy Court should not thereafter have that right.

But section 6 of the Act of April 9, 1873, did unquestionably render it unlawful for the Levy Court or any member thereof on behalf of the court to strike from the list as returned by the assessor the name of any person whether legally or illegally appearing thereon.

Yet even under the Act of April 9, 1873, the Levy Court was not deprived of the power to strike fictitious names from the list as returned by the assessor.

Thus the law remained until the Act of April 8, 1881 (p. 302, vol. 16, Del. Laws), was passed amending the Act of April 9, 1873. Before the passage of the Act of 1881 it had become evident that the sweeping prohibition against the removal of the names of any persons from the assessors' lists contained in section 6 of the Act of April 9, 1873, was unwise and directly calculated to encourage and shield fraud on the part of the assessors in making up their lists.

The Act of April 8, 1881, was passed to correct this evil. Among other things it struck out of section 6 of the Act of April 9, 1873, the words, "It shall not be lawful for the Levy Court, in either of the counties of this State, or any member thereof, to take from the assessment returned to the said Levy Court by any assessor, the name of any person appearing thereon;" and in lieu of the words so stricken out were inserted the words, "It shall not be lawful for the Levy Court, in either of the counties of this State, or any member thereof, to take from the assessment returned to the said Levy Court, by any assessor, the name of any person legally appearing thereon."

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The Legislature must be held to have intended to accomplish some result by this change; and it is inconceivable that they could have intended anything else in making the change than to empower the Levy Court to exercise the same authority which rightfully belonged to it before the Act of April 9, 1873, to strike from the assessors' list fictitious names and other names unlawfully appearing thereon. To argue to the contrary is simply to assume that the Legislature stultified itself.

The proposition of the counsel for the complainant that according to the contention of the counsel for the defendants, any member of the Levy Court as an individual would have a right to strike from the assessments such names illegally appearing thereon is absurd and does not merit a serious reply.

The Legislature, by the Act of 1881, having thus clearly authorized the Levy Court in the exercise of its power to correct the assessment list to remove names illegally appearing thereon, and not having re-enacted the provision of the Act of April 9, 1873, relating to the clerk of the peace, that provision by a reasonable and indeed necessary implication was either repealed or modified in such manner that the clerk of the peace could only be visited with a penalty for omitting from the collector's duplicate names appearing on the assessment list as revised, corrected, and settled by the Levy Court.

Since the Act of 1881 the Levy Court has possessed full power to strike from the assessor's lists all names which under the statutes of this State cannot legally appear thereon.

The Act of April 9, 1873, as amended by the Act of April 8, 1881, in addition to prohibiting the replacing upon the assessment lists of the names of poll taxables returned as delinquents within the period of twelve months next after their allowance as delinquent, provides penalties against the placing of fictitious names upon the

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assessor's lists or the names of persons not entitled to be assessed in the hundred or assessment district, or fraudulent names.

There is nothing in the Act of 1881 which by the remotest implication restricts the power of the Levy Court in dropping illegal names to only one of the above classes.

The Act of 1873 as amended by the Act of 1881 is to be construed by the provisions contained within its four corners and not in accordance with what any individual may suppose or understand to have been the purpose of the Act.

The Act of 1873 as amended relates to other subjects than the assessment of poll taxables. Section 2 shows that it relates to property assessments as well as poll assessments; and sections 4 and 7 show that it deals with fictitious names and persons nonresident in the hundred or assessment district. There is no legitimate process of reasoning by which the right of the Levy Court to drop names can be restricted to the names of poll taxables returned as delinquent and placed upon the list within twelve months next after their allowance as delinquent.

It is inconceivable that the Legislature intended under the Act of 1881, when using the words "legally appearing thereon" generally, that the Levy Court should not have the power to strike off precisely the same classes of names which under the old law the assessor had no power to put on his list, and against the placing of which on the list the Act of 1873 as amended in 1881 leveled severe penalties.

The affixing of a penalty to the commission of an act renders the act itself unlawful and a nullity. *Suth. Stat. Const.* § 335.

Therefore not only can the assessor be punished criminally for the placing of fictitious names on his list and the names of persons not entitled to appear thereon but

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such names so placed thereon are illegally thereon and consequently do not legally appear thereon.

Section 7 of the Act entitled, "An Act in Relation to the Levy Court of New Castle County" (p. 58, vol. 19, Del. Laws), commonly known as the Five Commissioners Bill, recognizes the power of the Levy Court to finally settle and determine the assessment list. Rev. Code, chap. 8, p. 63, § 16.

The monstrous results which would flow from a judicial construction of the legislation in question in accordance with the contention on the part of the complainant should have great weight in supporting the contention of the defendants.

Upon the contention on the part of the complainant an unlimited number of fictitious names might, and as experience proves, would, burden and falsify the assessment list as finally settled and determined by the Levy Court, and would defeat the precise purpose of the whole scheme of the making of an assessment list, viz., that it should be a true list and furnish a reliable basis for the adjustment of the tax rate.

It would not only produce confusion in the conduct of the fiscal concerns of the county by rendering it impossible for the Levy Court to accurately provide the requisite revenue, but would also inevitably lead to false registration of voters and the debauchery of the ballot-box.

No irreparable injury could result to any one from the exercise by the Levy Court of its functions in striking off names from the assessment list.

John H. Rodney, for the minority of the Levy Court defendants.

THE CHANCELLOR.—I have stated above all the material portions of the bill of complaint and the two answers thereto respectively, so that there may be no mistake or uncertainty in respect to the reasons governing me in the

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conclusion to which I have arrived or in the decision I may make.

If the recital or analysis of the provision of the bill and answers have been unduly long or apparently prolix, it is better to err in these respects, than to be wanting in a due and careful consideration in respect to the matters submitted for my consideration.

We are all liable to err, however desirous we may be to be right. He is fortunate who after the most careful study and consideration is assuredly right and has a consciousness of duty carefully and conscientiously performed. I would that the duty of deciding the questions involved in the controversy arising in this case could have been imposed upon others, and not upon myself. Not that I wish or desire to avoid the discharge of any duty imposed upon me by reason of my official position, but it is not unreasonable to have wished that the performance of this duty might have devolved upon others abler and more competent to perform it than myself. But it was said, in the course of the argument, and it may be true, that no tribunal is existing in the State for the decision of the matters in controversy, other than that of the Court of Chancery. I therefore assume the duties of my position without fear, favor, reward, or the hope thereof.

The community constituting the inhabitants of the County of New Castle may have allowed itself to have been wrought up to a state of excitement and interest, unreasonable and unnecessary, but we all must indulge the hope that such excitement, if it exists, will pass away, and the public mind and public feeling become calm and serene when time has given an opportunity for rational consideration and calm reflection.

I shall not notice that portion of the bill of complaint which states that William P. Biggs is a citizen and taxable duly assessed, of the County of New Castle, because it does not appear if he is such citizen and taxable that

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he has been taxed beyond his proportion of the taxes to which other citizens and taxables are subject or liable. But the complainant shows that he is clerk of the peace of the said county and says that the functions, duties, and responsibilities of his said office are about to be impaired, invaded, and overthrown by the threatened and impending action of the said Levy Court commissioners in unlawfully altering and reducing the number of names upon the assessment list so that it would be morally and legally unjust and improper for the said clerk of the peace to join in the certification of the said lists when names have been so omitted therefrom, and the said clerk of the peace would also become personally liable to heavy legal pecuniary penalties for certifying and furnishing duplicate lists to the county officers for collection from which names on the assessment lists when returned by the assessors had been stricken off by the said action of the said Levy Court. Now it is admitted by both answers filed in this cause that the said William P. Biggs is clerk of the peace of New Castle County, and clerk of the Levy Court of said county. There is no proper plea to the jurisdiction of this court to hear and determine the matters in controversy in this cause for the allegation contained in the thirteenth and concluding paragraph of answer of the majority of the Levy Court, that these defendants are advised and believe that the said complainant, William P. Biggs, has no right to bring or maintain this suit as a citizen, taxable, and resident of New Castle County, and as clerk of the peace for said county or in any of said capacities, either in his own behalf, or in behalf of other taxables, citizens of said county, does not raise the question of jurisdiction in this court to hear and determine the matters in controversy in this cause. But only whether the complainant in any or either of the capacities in which he sues has a right to bring and maintain this suit.

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Now I have already said that I shall not consider the question whether as a citizen and taxable of New Castle County he is liable to the payment of a tax because his liability in this respect is the same as that of other taxable citizens of said county. On this ground, therefore, the complainant would have no right to maintain his suit for relief common alike to himself and all other citizens and taxables of said county. But it is a very different question whether the complainant being clerk of the peace of New Castle County and as such being clerk of the Levy Court of such county has a right to maintain this suit, and has the right to invoke the equitable interposition of this court.

If the functions, duties, and responsibilities of his office of clerk of the peace are about to be impaired, invaded, or overthrown by the threatened and impending action of the said Levy Court commissioners in unlawfully altering and reducing the number of names upon the said assessment lists so that it would be morally and legally unjust and improper for the said clerk of the peace to join in the certification of the said lists when names have been so omitted therefrom; and if the said clerk of the peace would also become liable to heavy pecuniary penalties for certifying and furnishing duplicate lists to the county officers of collection from which names which were on the assessment lists when returned by the assessors had been stricken or removed by the said action of the said Levy Court,—a very different question arises from that under the question whether as a citizen and taxable he is liable or not liable for his proportionate share of taxes levied upon all other citizens and taxables for the support of the government of New Castle County.

Considered in this view, the complainant has a right to bring and maintain his suit in this court, if the allegations of his bill in this respect are true.

The two main grounds of contention on the part of the

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defendants and which were urged at the hearing at great length and with much ability and vigor are: First, that the power given to the Levy Court in sections 9 and 12 of chapter 8 of the Revised Statutes to "correct and add to the assessments returned" and to make "additions to and corrections of the assessment list" includes the power to strike from the list the names of any that they may judge unlawfully thereon; second, that the inhibition contained in the 6th section of the Act of 1873 as amended by Act of April 3, 1881, vol. 16, Laws of Delaware, page 306, to wit, "that it shall not be lawful for the Levy Court in either of the counties of this State or any member thereof to take from the assessment returned to the said Levy Court by any assessor, the name of any person legally appearing thereon,"—by implication gives to the Levy Court the same power and jurisdiction.

A careful examination and consideration of the statutes brings one to the conclusion that the power "to correct," is never given in connection with the power "to take off," names from the assessment lists.

The power "to correct" is given to the Levy Court in connection with the power to add to the assessment lists and is always in context with the valuation of property the increasing or diminishing the amount of the assessments and the "adding" to the lists the names of those who have been omitted and determining their assessments.

When the Legislature has provided for the dropping or taking from the assessment the names of any persons that should not be thereon it has shown that it knew how to use apt and express words for that purpose. And it has always indicated with precision the very names which should be taken off and never left it to any direct provision of law to the discretion judicial or otherwise of any person or body of persons to determine what names should be dropped from and what should remain on the

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assessment list and that this should be so is easily seen when we consider how serious the function of taking the names of persons from the assessment list may be in relation to the elective franchise, more serious far than the function of adding names to such lists. Because if a name should be added improperly, it can only give such person the right to vote if he is qualified to do so under the constitution and under the safeguards thrown around the exercise of the elective franchise by law; but if a person's name should be improperly dropped his right to exercise his constitutional elective franchise is entirely extinguished.

Now it would not be expected that the Legislature animated with a just regard of the fundamental rights and liberties which they are bound to protect, would in the view of the matter carefully provide for and protect the rights and duty of adding names to the assessment lists, and then leave it to the general power of correction given to the Levy Court to drop names at their discretion.

We do not think the Legislature have so acted, but as they have only given the power to add names by express language to that effect, so they have only given the power to take off names by the use of language likewise explicit and express.

We do not think, therefore, the words "correct and add" and "make additions and corrections" in the ninth and twelfth sections of chapter 8 of the Revised Statutes or wherever else they may occur, are to be taken in this case as equivalent to the words "take off and add" or "make additions to and omissions" from the assessment list.

Now as to the second ground for the contention that this power and jurisdiction to take names from the assessment list belongs to the Levy Court—the majority of

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the defendants say that it is conferred by implication by the insertion of the word "legally" in the sixth section of the Act of 1881. We quote again the part of said section referred to—"Section 6. Be it further enacted as aforesaid that it shall not be lawful for the Levy Court in either of the counties of this State or any member thereof to take from the assessment returned to the said Levy Court by any assessor the name of any person legally appearing thereon." Vol. 16, Laws of Delaware, page 306.

The Levy Court of New Castle County is not, in any legal proper sense of the term "court," a judicial body known to the Constitution as part of the judicial system of this State, and possesses no judicial power as recognized in such Constitution or judicial system. It is composed of a certain number of freeholders of the county who exercise some few quasi judicial functions and powers, but for the most part powers and functions which are no greater or essentially different from those purely ministerial. The powers and functions of the Levy Court are derived from and are clearly defined in the Acts of the Legislature. They are truly statutory. The Levy Court possesses no inherent or original powers. Its functions and powers are defined and limited by statutory law. They are thus entirely limited and circumscribed.)

Let us consider the state of the law in regard to this matter of assessments and the duties of assessors and levy courts as prescribed thereby.

The office of assessor is created by law, and the duties attaching to it are carefully defined and described. He is elected in and for a comparatively small district, presumably from his knowledge and acquaintance of and with persons and property therein.

He must in the first instance act on his own knowledge

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and information in making his lists and valuations, and then he must expose the same in five public places in his district for examination, and afterwards he must sit at a convenient place and times prescribed by law, to place upon the lists those who in the manner provided by law prove their right to be so placed. The provisions of law prescribing his duties are exceedingly precise and stringent, and if he obeys them, the lists made by him will be as accurate and fair as human agency can make them.

He is then required to return them to the Levy Court, and so careful is the law that every one who has the right to be assessed shall have the opportunity that it again provides in the express words for the Levy Court adding to the lists the names of any that may have been omitted by the assessor, and prescribe with particularity for the mode and manner in which such additions shall be made. But we again note that there is no authority expressly given to the Levy Court, or to any body to take from the lists so returned any name whatever and no method or manner of doing so is described.

At the time of the passage of the Act of 1881, there had been for eight years on the statute books a law that required the collectors of county taxes in the several counties of the State to give notice of sittings at certain times and places for the collection of taxes. And that when any such collectors should make return at the proper time to the Levy Court of a delinquent list of poll taxables accompanied by oath that he had conformed to the requirement of the law stating therein specifically, it should be the duty of the Levy Court to make allowance to said collector of delinquents so returned by him, and that "the names of such delinquents should be dropped from the assessment lists by the Levy Court, and shall not be placed thereon again for a period of twelve months from and after the date of such allowance."

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The ninth section of the Act of April 9, 1873, also provides "that it shall not be lawful for the assessor or any Levy Court upon the personal application of any one, or otherwise to place upon the assessment in any hundred the name of any person who, having failed to pay the county tax assessed against him or her for the preceding year was returned and allowed as a delinquent until after the expiration of the twelve months from the time such allowance as delinquents was made by the Levy Court."

So that at the time of the passage of the Act of 1881 the law pointed out with exceeding precision the names which should be dropped by the Levy Court from the assessment list, and which during a prescribed period should not legally appear thereon. It is to be observed that the duty enjoined on the Levy Court to drop these names is ministerial and not in any sense judicial. The names to be dropped are a matter of record to the Levy Court. They do not have to be ascertained *dehors* the record. All the names on the designated record must be dropped. The Levy Court has no discretion to drop some and retain others.

Now let us consider what the force and effect of the word "legally" in the sixth section of the Act of 1881 is, and to what it has relation. Manifestly it would seem to the provisions of law just quoted. Suppose a name had been returned on his list by the assessor which had been within the twelve months returned as delinquent by the collector, and had in obedience to law been dropped by the Levy Court from the assessment list; the law forbade the assessor to add that particular name to his list, and declared that it should not be placed thereon by anybody. Clearly such a name did not "legally" appear thereon. The law itself points out and designates the very names which cannot thus "legally" appear on the assessment—nothing is left to the judicial determination

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of any one in order to ascertain them. But this cannot apply to names which some person or persons, no matter how responsible, may aver to be on the lists illegally, by reason of some alleged transgression of the law by the assessor, but which cannot be determined except by judicial inquiry. The presumption of the law is that the assessor has performed his duty, and when he returns his assessment at the time and in the manner provided by law, the names thereon legally appear, unless the law itself makes the contrary appear, by pointing out ascertained names that are forbidden to appear thereon. To drop these involves only the performance of a ministerial duty. But to drop those which the answer of the majority of the Levy Court declares they intend to drop, involves a very different kind of duty, to wit, a *quasi* judicial one. That this is true, we need only refer to paragraph eleven of the answer of a majority of the defendants, which states explicitly and frankly the power claimed by them and what, if not restrained, they intend to do in this regard. It is as follows:

"11. These defendants further answering say, that since Tuesday, the second day of February, instant, sundry reputable and responsible citizens and tax-payers of New Castle County have openly and publicly charged that a very large number of names appearing upon some of the said assessment lists returned by said assessors to the said Levy Court, on the second day of February, instant, were unlawfully placed and do not legally appear upon said assessment lists, and that the said names, so unlawfully placed upon said assessment lists, include a large number of fictitious names placed upon said lists in direct violation of the statute of this State in that behalf, and also a large number of names of poll taxables who were not residents of the hundreds or assessment districts from which they were respectively returned by said as-

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sessors as assessed, placed upon said lists in direct violation of the statute of this State in that behalf, and also a large number of names of poll taxables already assessed and standing upon the assessment lists of said hundreds or assessment districts respectively, and unlawfully placed upon said assessment lists returned on the second day of February, instant, as aforesaid; and also a large number of names of poll taxables unlawfully and fraudulently duplicated upon said assessment lists, returned as aforesaid. That they are now engaged in the examination of said assessment lists so returned as aforesaid for the purpose of ascertaining whether or not names appearing upon said lists have been unlawfully placed thereon as aforesaid; and these defendants as constituting a majority of the said Levy Court propose and intend, should they be satisfied upon due examination that any names have been so unlawfully placed upon said assessment lists so returned as aforesaid and do not legally appear thereon, to cause the same to be stricken from said lists, not by obliteration, erasement, defacement, or mutilation of said lists or any part thereof, but by the placing of a distinguishing mark upon or opposite to such name as shall be stricken from said lists.

Here is a claim of a judicial power of a very high and important character. No mode is prescribed in the law for the exercise of this power. They may have evidence or not as they please, they may or not rest satisfied with the charges, and believing them to be true proceed forthwith without hearing or notice to drop any or add the names thus inculpated. There is no instance of any previous or subsequent legislation undertaking to grant such a power. I need not dwell upon the importance and value of the rights it proposes to deal with. If it exists it can make the lists of persons qualified to vote what the majority of the Levy Court pleases; surely the assertion

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of a power so far reaching as to be able to overthrow all the security of the elective franchise should not be made except upon direct and express authority of the Legislature. But there is no direct or express authority anywhere to be found in the statutes of the State for such a monstrosity of assumption. At best it is claimed to rest upon the "implication" arising from the use of the word "legally" in the sixth section of the Act of 1881. The argument is that inasmuch as the Act says that it shall not be lawful for the Levy Court or any member thereof to take from the assessment returned by the assessor the name of any person "legally appearing thereon," that therefore the Levy Court may take from such assessment the name of any person which they may judge to be there illegally—without pausing now to repeat what we have before said that such a power must rest upon positive and direct expression of the legislative will and not upon implication—we observe that if the implication "legally" clothed the Levy Court with this high judicial power, it may be well argued that it clothed with like power "any member thereof." The language being that it shall not be lawful for the Levy Court or "any member thereof" to take from the assessment lists the name of any person legally appearing thereon. This of course might be said to be monstrous, but it serves to show the danger of arguing the existence of the judicial power from anything except the express grant of legislative enactment.

The Law of 1873 in regard to the return by the collectors of delinquent poll taxes and their allowance by the Levy Court and the requirement that the names of such delinquents be dropped by the Levy Court from the assessment and that they should not be put on again by the assessors for the period of twelve months has been repealed by the Act of May 13, 1891, and May 15, 1891.

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The conclusion is therefore reached that the defendants the members of the Levy Court of New Castle County, are not authorized by law to drop from the assessment lists returned to it by the several assessors of said county any names appearing thereon, or to do any of those things which in the eleventh paragraph the majority of said court say they propose and intend to do. It seems clear, therefore, from the best consideration which I have been able to give to the subject in the brief period in which it has been considered by me that the clerk of the peace of New Castle County has a special interest in regard to the duties of his office as imposed by law in the integrity of the assessment lists as they left the hands of the assessors.

"It is a monstrous proposition" said Mr. Bradford in his argument in this cause "that the Levy Court clothed with this power had not the right for the purpose of settling a true basis for the adjustment of the tax rate to strike from the assessment lists required to be submitted to it for its revision and correction fictitious names and other names illegally placed thereon." How much more monstrous is the proposition that the Levy Court has the power to strike from the assessment lists returned to it or the clerk of the peace the names of persons on the assessment lists so returned when the clerk of the peace is by law required to place upon his duplicates the names returned by the assessors and as returned by the assessors. This is the question to be decided on the statute as it is and on this alone.

The clerk of the peace is bound to obey the law as it is and not as others by implication would have it to be. Fortunately for the people of the whole State the law by which they are governed is clearly expressed and not the subject of implication merely. This express law of the State would subject the clerk of the

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peace to pecuniary penalties if he fails to observe and obey it. What would be the consequences if the proposed action of the Levy Court was to be adjudged legal, and the Levy Court of New Castle County be adjudged to possess the power which they claim in respect to the assessment lists as returned by the assessors, and what would be the consequences, if their example was followed in the other counties of the State, it is not for me to determine or even to imagine.

This opinion had been dictated thus far when my eye almost accidentally fell upon the fifth paragraph of the answer of the members of the majority of the Levy Court. I do not recollect that this paragraph was particularly discussed if discussed at all, in the argument of this cause, and my attention to it may not have been called in the argument. Let us consider it. It is in these words:

"These defendants do not admit, but on the contrary deny, the truth of the allegations contained in paragraph 5 of said bill of complaint in manner and form as the same are therein set forth; and they further deny that the said Levy Court commissioners since the return of the said assessment lists as aforesaid, have unlawfully or wrongfully obliterated, erased, or stricken off the names of any persons appearing on the said lists returned by the said assessors as taxables of the said county.

"And these defendants in further answer to the allegations contained in said paragraph five aver that whatever names have been stricken by the said Levy Court commissioners from the said assessment lists as returned as aforesaid, were names illegally placed thereon, and that the said Levy Court commissioners have not nor have any of them obliterated or erased any of the names so stricken from said lists."

What is the meaning of this paragraph? Whatever names say the majority of the Levy Court have been

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stricken by the said Levy Court commissioners from the said assessment lists as returned as aforesaid were names illegally placed thereon and that the said Levy Court commissioners have not nor have any of them obliterated or erased any of the names *so stricken* from the said lists. Is or is not this an admission that the Levy Court commissioners have stricken *some* names from the said assessment lists as returned without stating what or how many? If they have the question whether the names were illegally placed thereon is not a question for the Levy Court commissioners to decide themselves but one for this court to decide. It is not for the Levy Court commissioners to assume that such names were illegally on the assessment lists as returned as aforesaid and that therefore they had the right to strike them therefrom, for that is one of the points of contest or controversy in this cause. If these names were on the assessment lists when returned to the said Levy Court then this court has already indicated the opinion that they could not be stricken therefrom by the Levy Court commissioners. The answer in the sixth paragraph is also dubious and uncertain. The majority of the members of the Levy Court therein say "that they do not admit, but on the contrary deny, the truth of the allegation contained in paragraph six of said bill of complaint in manner and form as the same are therein set forth and they further deny that it was or is the intention or purpose of the said commissioners of the said Levy Court to change or alter the said lists or any of them *by arbitrarily and without warrant of law* striking off or expunging therefrom any names or name whatsoever appearing thereon. Now this is not the question in this case. The question is, Have the Levy Court already stricken off or is it the intention or purpose of the said commissioners of the said Levy Court to change or alter the said lists or any of them by striking

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off or expunging therefrom any name or names whatsoever appearing thereon at the time when the same were returned to the Levy Court. If they have stricken off or expunged from the lists so returned or changed or altered the said lists by striking or expunging therefrom any names or name whatsoever appearing thereon, the charge of so doing is not satisfactorily answered by saying that said action was not done arbitrarily or without warrant of law, for that question is for this court to decide and not for these defendants to determine for themselves when the propriety and legality of such action is the matter in controversy in the cause. It won't do for a majority of the Levy Court to say as they have done in their answer to this paragraph of the bill that they, as constituting a majority of the said Levy Court, intend to cause to be stricken from said assessment lists so returned as aforesaid such names and only such names as the said Levy Court, while engaged in the discharge of what they term legal duty imposed upon it of revising and correcting lists, shall be satisfied on due examination were unlawfully, and do not legally appear, thereon. For the very question to be decided is whether the lists so returned by the assessors to the Levy Court can be revised and corrected by striking therefrom names which were thereon when returned to the Levy Court and before the process of revising and correcting in said answer mentioned was undertaken or performed. In like manner the seventh paragraph of the answer of the majority of the members of the Levy Court might be analyzed and its true meaning discovered. Whether the number of names upon the said lists of persons assessed as taxables has or has not been reduced by the members of the Levy Court making their answer to the bill of complaint since the lists on which said names appeared were returned to the Levy Court is the question, and whether there was

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legal authority for the reduction of the number of names upon the said list of persons as taxables is more pertinently the issue involved. But the character of this answer already sufficiently appears by the examination and analysis which I have given it, and further time devoted to the performance of such duties may seem to be needlessly spent and such examination appear needlessly prolix and uninteresting.

During almost fifty years I have been a member of the bar of the State of Delaware. In early life I was counsel for the Levy Court in the county in which I then resided, and during that period of time I have never known and I have never heard, until the argument of this case, the course which a majority of the Levy Court of New Castle County say in their answer they intend to pursue, pursued by the Levy Court in any county of this State. It is too late, therefore, for me officially to recognize its propriety, lawfulness, or judicially to give countenance thereto.

Finally I remark that the Levy Court of New Castle County is not, in the strict or proper sense of that word, a court, but is a body of commissioners elected and constituted as in the statutes of the State is prescribed, with limited and well-defined powers and duties; which powers and duties are in some respects, and in some respects only, quasi judicial, but in most respects ministerial only.

I, therefore, adjudge and decree as follows:

And, now, to wit, this second day of March, A. D. 1892, it appearing to the Chancellor that William P. Biggs, being the clerk of the peace of New Castle County and *ex officio* clerk of the Levy Court of New Castle County, has a right to bring and maintain his suit in this court, for the causes alleged and existing, and is entitled to a decree of this court for his protection as such clerk

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of the peace and clerk of the Levy Court, the Chancellor, after hearing the arguments for the complainant and respondents, respectively, and after considering the same, doth see fit to order, adjudge, and decree, and doth hereby order, adjudge, and decree, that Richard G. Buckingham, James H. Clark, Andrew S. Eliason, Isaac N. Grubb, Paul Gillis, Henry D. Hickman, David P. Hutchinson, John W. Jolls, Samuel Kilgore, Robert B. Simpler, and Robert Sutton, Levy Court commissioners for New Castle County, be and they are hereby restrained and enjoined from striking from the said assessment lists made and returned when and as stated in said bill of complaint to the said Levy Court by the said assessors named in said bill, any names or name whatever appearing upon the same and returned as taxables of the said county; and that any other names which have been added to the said lists otherwise than at the time and place and in the manner provided by law in that behalf since the said return of the said assessment lists be and the same are hereby ordered to be stricken from the said lists; and it appearing to the Chancellor that Richard G. Buckingham, James H. Clark, Paul Gillis, David P. Hutchinson, John W. Jolls, and Robert B. Simpler, a majority of the members of the said Levy Court, did and performed, or threatened and intend to perform, the acts, deeds, and things complained of against the protest of Andrew S. Eliason, Isaac N. Grubb, Henry D. Hickman, Samuel Kilgore, and Robert Sutton, the minority of the said Levy Court, who have in substance confessed the bill, it is further ordered, adjudged, and decreed that the said Richard G. Buckingham, James H. Clark, Paul Gillis, David P. Hutchinson, John W. Jolls, and Robert B. Simpler, being a majority of the said Levy Court, pay the costs in three months or attachment.

Syllabus.—Statement.

JOHN MEALEY

vs.

RICHARD B. BUCKINGHAM *et al.*

New Castle, In Vacation, July, 1891.

*Collector's bond—obligation of sureties—injunction
against mutilating tax list.*

1. The obligation of sureties on a tax collector's bond in the usual form provided by the Delaware Revised Statutes extends to the faithful performance of his duty by their principal and no further.
2. It seems that the settlement of a collector's accounts by the Levy Court and the making of allowances for delinquents as provided by Delaware Laws, chap. 8, § 21, will not prevent the holding of the collector and his sureties liable for money received and not accounted for by the collector.
3. A suit to enjoin proceedings to collect from a surety on a collector's bond an amount collected but not accounted for by his principal on the ground that the matter was concluded by the settlement of the collector's accounts is premature, if no execution has been issued or other steps taken to collect the judgment, although the judgment has been entered.
4. An injunction may properly be issued to prevent the altering or obliterating of entries made upon an assessment and delinquent list on file in the clerk's office at the request of a surety on the collector's bond, although his suit to enjoin the collection of a judgment against him for moneys collected but unaccounted for by the collector fails because prematurely commenced.

INJUNCTION BILL.—The bill seeks to restrain the enforcement of a judgment against defendant, a surety on the bond of a tax collector, which was alleged to have been recovered after the collector had made a final settlement and received his discharge from the proper authorities. The facts sufficiently appear in the opinion.

Argument for plaintiff.

John H. Rodney, Willard Saulsbury, Jr., and Branch H. Giles, for the plaintiff :

Practically the sole ground, sought to be presented as a material defense to the prayer of the bill, urged in support of the action of a majority of the defendants, is that they believe the list allowed by them to be fraudulent and that the collector before its allowance and the credit thereof given on his official bond, did not make and subscribe the oath required by the statute to its correctness, etc.

It however appears that some kind of a jurat by an officer capable of administering an oath is subscribed to said list, and complainant submits that even had no oath of any sort been made the allowance of said list it would not thereby be invalidated ; the only reason for this requirement being to give to the Levy Court some prima facie evidence upon which their settlement, allowance, and credit could be based, and if they waived this requirement enacted for their own protection, it merely shows a delinquency on their own part to require that every safeguard shall be made use of to protect the county against unjust and invalid claims.

Their own fault cannot be made the ground for setting aside their own final action in their own favor to the prejudice of this complainant who had no part in the transaction and for whose benefit the credit was allowed.

The allegation of fraud is moreover fully and explicitly denied by affidavits submitted, and it is submitted that both facts and law can be presented to this court to show the contention groundless, and it is confidently submitted that sufficient both of law and facts have been produced at this stage of the cause to warrant the issuance of the injunction as prayed.

Complainant contends :

1. That it is not competent or legal for the Levy Court

Argument for plaintiff.

to reinstate or add to the assessment lists the names of those previously allowed as errors.

It is provided by Rev. Code, chap. 8, § 21, that in the month of March of each year the Levy Court shall adjust and settle the accounts of the collectors, making all just allowances, and the adjustment and settlement shall be final; and shall examine and settle the delinquent list and make allowance of delinquents, and upon such allowance the collector shall be credited with the amount thereof, and by § 1, chap. 372, Vol. 14, Laws of Delaware, in force at the time the error and assessment list in question were acted upon, it is provided that the name of such delinquents shall be dropped from the assessment list by the Levy Court. This last provision was in fact carried into effect in the case now before the court and the clerk of the peace made upon the assessment lists the usual and proper entries to indicate that those who had been returned delinquent had been allowed as errors to the collector.

2. That as appears from the affidavits filed in this cause no sufficient proof has been made to the Levy Court of the right of the persons so ordered to be reinstated by the Levy Court upon the assessment lists. Admitting that the Levy Court had the right to reinstate the names of those allowed as delinquents who had paid their tax, yet it is submitted that in such case proper and legal proof must be offered to support such claim. This is a matter of fact which it is claimed cannot be determined upon the rule to show cause why a preliminary injunction shall not issue, but upon the subsequent proceeding to make that injunction a permanent one.

3. The complainant claims that he is a proper person to ask for this injunction and prohibitory writ.

After a credit has been allowed a public officer by the government and his accounts have been settled it is not

Argument for plaintiff.

competent for the government to open the account and revoke such credit unless it were originally given through fraud, imposition, or mistake.

9 U. S. Dig., Officers, IV. p. 689, cites *United States v. Kuhn*, 4 Cranch, C. C. 410-419.

Injunction will lie against public officers infringing private rights, ostensibly in the performance of duties but illegal in themselves.

Shortt, Extraordinary Legal Remedies, 132; Kerr, Inj. 568, 605; 3 Pomeroy, Eq. 1345.

For example against sheriff selling or levying under authority of an execution.

The ground of this application is fraud on the bondsmen of the collectors. They have no day in court.

To place one on assessment list certain legal formalities and proof are required.

16 Del. Laws, 306, chap. 320, § 6.

The law presupposes a personal application and by that means only can corrections be made.

16 Del. Laws, p. 307, §§ 9, 10, chap. 320.

Time for corrections has expired,—the repeal was only enacted to authorize putting delinquents on next year or January.

19 Del. Laws, chap. 30, p. 78; 14 Rev. Code, p. 82, chap. 371; *Smith v. Ridings*, 9 Houst. (Del.) 235.

The Levy Court has only the right to levy tax in accordance with a law of the State.

Philadelphia, W. & B. R. Co. v. Neary, 5 Del. Ch. 600, 607.

Collectors of Wilmington are required to give an itemized bill to taxables.

17 Del. Laws, 37, chap. 23.

This injunction should at least issue to stop action till opinion is obtained from the court of errors and appeals.

Kerr, Inj. 611, 28.

Attorney for defendants—Opinion.

The delinquent list must be settled and allowed in March.

Rev. Code, 65, § 21.

This settlement and allowance and credit allowed collectors is final.

Ibid.

Judicial power of Levy Court, if any, ceased as to whom should be allowed as errors in March.

Edward J. Bradford, for the defendants.

THE CHANCELLOR.—It appears by the bill, and it is admitted by the answer in this cause, that George W. McKee was appointed by the Levy Court of New Castle County a collector of taxes for the southern district of the city of Wilmington for the year A. D. 1890, and as such collector of taxes entered into a bond to the State of Delaware in the sum of \$100,000, with other persons in said bill named, as sureties, which said bond was accepted by the Levy Court. That a judgment, No. 293, to May term, A. D. 1890, was entered upon the said bond in the Superior Court of the State of Delaware in and for New Castle County on the 8th day of July, A. D. 1890, against the said George W. McKee and his sureties.

The bond is not before me, but I presume it is in the usual form which may be found in the Revised Statutes of this State. The sureties in such a bond are of course bound by it for the faithful performance of his duty by their principal. To this extent their obligation extends and no further.

A duplicate of the taxes levied by the Levy Court is delivered to the collector which taxes he is bound to collect, subject to deductions made by the Levy Court for delinquents, a list of which delinquents is returned by the collector to the Levy Court.

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Allowance of delinquents is made by the Levy Court and upon such allowance the collector is credited with the amount thereof.

At the meeting in March in each and every year as provided in section 21, chapter 8, of the Laws of Delaware, the Levy Court shall examine, adjust, and settle the accounts of the collectors, making all just allowances and the adjustment and allowance shall be final.

The complainant contends that after the allowance of the delinquent list returned by McKee as collector, his principal, and his accounts settled in March, it was final, and relies, among other things, upon authority cited, stating that when a credit has been allowed a public officer by the government and his accounts have been settled, it is not competent for the government to open the accounts and revoke such credit, unless it were originally given through fraud, imposition, or mistake. Now the words, "unless it were originally given through fraud, imposition, or mistake," are very important words and of significant import. But I do not intend in this or any other case to be governed or influenced by any partisan political opinion which may be urged or even suggested by any party, to any cause. Here no such questions are considered or entertained. Here the important question is, Did McKee, the principal in the bond, receive in payment of taxes on the duplicate made out and placed in his hands by the Levy Court any money not accounted for by him?

If he did, the proper judicial authorities will see to it that he and his sureties shall be held to proper accountability in respect to the same, and at the same time be protected against any illegal increase of their liability; but I am not going into this question now. Although it was said in the argument on one side, and consented to on the other side, that the judgment had been entered

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against McKee and his sureties in the Superior Court of the State of Delaware in and for New Castle County, and that an execution had been issued thereon, yet it nowhere appears, either in the bill or answer that such execution had been issued, or that anything had been done toward the collection of such execution.

It will be necessary to consider such questions whenever they more properly arise hereafter.

It is proper and necessary that the record and papers recorded or filed in a public office such as that of the clerk of the peace or clerk of the Levy Court be preserved unchanged, unobliterated, unaltered, and in their entirety, by any one whatever and whomsoever.

These records may or may not be available as evidence to parties in litigation, and may or may not be evidence in suits in controversy at law or in equity, in respect to public or private rights.

They should be preserved in their entirety for any and all purposes for which they may be legally available.

If they should ever be proper as evidence their preservation unchanged would be proper and imperatively necessary. Let no one therefore causelessly or illegally change, mutilate, alter, or efface them.

What names shall appear upon the assessment list to be delivered to the receiver of taxes for New Castle County for the year 1891, is a question which does not properly arise in this case; one over which I have no jurisdiction; one which does not affect the interest or liability of the complainant in this cause. I therefore disregard it as inapplicable to the controversy legitimately before me.

And now, to wit, this 23d day of July, A. D. 1891, it is ordered, adjudged, and decreed by the Chancellor:

That the restraining order heretofore issued be discharged, except in so far as said order restrains defend-

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ants, their agents, servants, or employés from altering, or changing, or obliterating the entries made by the clerk of the peace of New Castle County upon the assessment list, or list of delinquent taxables returned by the said George W. McKee, collector, as delinquents, and allowed by the said Levy Court as delinquents to said collector, or upon the records of the said Levy Court, or upon the said delinquent list so returned.

And it is further ordered, adjudged, and decreed that the defendants be and are hereby enjoined from altering, obliterating, or changing the assessment list or lists of delinquent taxables returned by the said George W. McKee, collector, as delinquents and allowed by the said Levy Court as delinquents to the said collector, until the further order and decree of the Chancellor.

And be it further ordered, adjudged, and decreed, that the bill of the complainant, so far as not affected by this decree, be dismissed without prejudice, and that the complainant have leave hereafter to file a new bill, if hereafter he should deem it proper and necessary.

Syllabus.—Statement.

EDWIN E. MONTELL *et al.**vs.*NEW CASTLE IRON & STEEL CO. *et al.*

New Castle, February T. 1882.

Assignment for creditors; necessity of creditor's assent.

1. A voluntary assignment to a trustee for benefit of creditors is void as against creditors not assenting thereto, in the absence of statutory provisions making it valid.
2. Delaware Act of March 25, 1875, does not validate assignments of creditors which are otherwise invalid nor alter the prior law upon that subject, but simply provides a course of procedure in case a valid assignment has been effected.

PETITION FOR RULE.—This is a petition for rule upon assignee for creditors to show cause why proceeds in his hands should not be paid to petitioner.

On October 24, 1881, the New Castle Iron & Steel Company made an assignment of its property and effects for the benefit of its creditors to Alfred S. Elliott and on the same day the Chancellor appointed Edward Betts and Charles M. Pusey as appraisers. On September 23, 1881, Edwin E. Montell had brought an action against the assignor in the Circuit Court of the United States for the District of Delaware and the 25th day of October he recovered a judgment in such action for \$847.82 besides costs. He issued execution and levied on the property of the company and the same property was levied upon under executions upon judgments in favor of Grubb & Sons and Edward S. Davies. On the 15th of October, 1881, the company had attempted to make an assignment for the benefit of its creditors to Edward Betts, but it was not perfected. The creditors had no notice of the assignment and never concurred therein. The property was

Attorneys' names.—Opinion.

afterwards sold without prejudice by agreement of the parties. Upon this state of facts the creditors prayed for a rule upon the assignee to show cause why the assignment should not be declared invalid, and why they should not receive the proceeds of the sale.

Benjamin Nields, for Edwin E. Montell.

George Gray and *Anthony Higgins*, for the other judgment creditors.

J. H. Hoffecker, Jr., for the assignee.

THE CHANCELLOR.—It is agreed that on the 24th day of October, 1881, the New Castle Iron & Steel Company, then being indebted to divers persons and firms and among others to Edwin E. Montell, Grubb & Sons, and Edwin S. Davies, made a voluntary assignment of all its effects to Alfred S. Elliott in trust to sell and dispose of the same and to collect and recover all the outstanding claims and debts due the said company and from the proceeds, after deducting his reasonable costs and charges, to pay the creditors of the said company in full, if the assets realized should be sufficient, but if not sufficient, to pay the demands of said creditors *pro rata*, without preference as between individuals. Alfred S. Elliott, the assignee, accepted the trust and entered upon the discharge of his duties under it and filed with the Register in Chancery an inventory of the effects assigned on the same 24th day of October, 1881, accompanied by his affidavit, and gave bond with sureties, and on the same day the Chancellor appointed appraisers, who returned their appraisal on the 26th day of October, 1881.

It is further agreed that the creditors of the New Castle Iron & Steel Company had no notice or knowledge of the said assignment at the time of its execution and that neither Montell, Grubb & Sons, nor Edward S. Davies have ever given any assent thereto. It further ap-

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pears as admitted that the said Montell, Grubb & Sons, and Davies have severally recovered judgments on their respective claims in the Circuit Court of the United States for the District of Delaware at the October Term, 1881, of said court, on the 25th day of October, and subsequently caused writs of *fiery facias* to be issued which were delivered to the marshal who levied upon the goods and chattels assigned as aforesaid, as the property of the said company and advertised them for sale in execution of the writs. Pending the proceeding the assignee wrote to the creditors, suggesting that the interest of all parties would be best promoted by permitting them to dispose of the goods at private sale and obtained the consent of the said execution creditors among others, with a reservation of their rights, the complainants expressly stipulating that their status was not to be affected but that the fund should be held subject to the determination and distribution of a court of equity upon all the facts.

By this sale therefore the goods have simply been converted into money, without altering the position of the parties in relation to the right thereto.

Upon the facts the case before me is reduced to the consideration of two questions: (1) Whether the assignment by the New Castle Iron & Steel Company taken irrespective of the Act of the General Assembly passed March 18, 1875 (15th Vol. 311), was sufficient to vest the property therein mentioned in Alfred S. Elliott, the assignee, so as to protect it against creditors neither parties nor privies to the said assignment even consenting thereto; (2) whether if not otherwise protected the said Act of March 25, 1875, has the effect to render the assignment valid, so as to have that operation.

I. In determining the first question it seems to me that this case falls clearly within the principle announced in *Waters v. Comly*, 3 Harr. (Del.) 117, and whatever might

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have been my opinion of the matter had been *res integra*. I am bound by the judgment of the Court of Errors and Appeals. In that case Waters and Laird, being in failing circumstances, executed a bond to McMathin, Burgess, and Kelly for a large sum of money, exceeding their assets, upon a parol trust to pay the creditors mentioned in a schedule, Kelly, one of the assignees, being a creditor to the amount of \$400.

It is manifest from the statement of facts that there was an attempt to prefer creditors, in which it differs from the case now before me, but the decision of the court did not proceed wholly nor mainly upon that consideration. It was an appeal from Chancery and the Chancellor in discussing the meaning of the act concerning fraudulent assignments had said: "It is apparent this act was not made to prevent assignments but to prevent persons in contemplation of insolvency, either by assignment or otherwise, doing any act to prefer creditors." This view was not sustained by the Court of Errors and Appeals. On the contrary, it was distinctly announced by that court, and reaffirmed in subsequent cases, that when no assignment is attempted the preference by a debtor of particular creditors, either by payment or through the instrumentality of trade, is not forbidden even if done in contemplation of insolvency.

In the case of *Wharton v. Clements*, 3 Del. Ch. 209, Chancellor Bates construes the case of *Waters v. Comly*, *supra*, to announce the conclusion of the majority of the court on this point, that the bond being given in an amount exceeding the whole of the property of the debtor was equivalent to and a substitute for a formal assignment and as such was an evasion of the statute.

The decision in *Waters v. Comly*, however, was not based entirely nor principally on that ground, but on another in which the whole court concurred and which was entirely beside any question of preference of creditors.

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The ground was the invalidity of a voluntary assignment executed by a debtor to a trustee of his own selection without the privity or assent of his creditors, as against such creditors.

On this subject the enunciations of the judge are harmonious and unequivocal. They all hold, in conformity with *Garrard v. Lord Lauderdale*, 2 Russ. & M. 451; *Bill v. Cureton*, 2 Myl. & K. 503,—and the line of cases announcing the same principle, that a deed of assignment operates merely as a power to the trustee, revocable by the debtor, that the character of *cestui que trust* never existed between the creditor and the trustee but that the debtor himself was the only *cestui que trust*, having in him the whole beneficial interest—that the arrangement was one wholly for the convenience of the debtor and that the creditors were without remedy against the nominal trustee either at law or in equity.

Such being the judgment of the highest court of this state it is binding upon me, and in my opinion it clearly embraces the case of this assignment now under consideration.

II. I cannot see that the matter is helped by the Act of March 18, 1875. That act nowhere professes to declare what shall constitute a valid assignment, but only prescribes that when a voluntary assignment is made certain things must be done as therein specified. Now this must be construed to mean an assignment not prohibited by law and which would otherwise be unimpeachable. That this must be the meaning is manifest from the phrase “in trust for his creditors or some of them.” Now were the construction to be given that this act validated an assignment because its provisions were complied with, it is clear that such construction would repeal the statute prohibiting a preference of creditors by a debtor in contemplation of insolvency, for the act speaks expressly of

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a partial as well as of a general assignment and of an assignment for the benefit of particular creditors in exclusion of others.

The statute must be read in the light of the purpose for which it was enacted, to wit, the security afforded both to the *cestui que trust* and the assignor, by the bond of the trustees, the inventory and appraisement and the supervisory control of the chancellor, and not as validating assignments otherwise illegal, or as in any wise altering existing laws regulating the capacity on the part of debtors to create such trusts or as declaring the effect of such trusts when attempted to be made between the debtor and his voluntary assignee without the privity or assent of his creditors.

Decree accordingly.

APPENDIX A.

ELIZA GREEN, WIDOW OF JOHN GREEN, DECEASED,

vs.

GOVE SAULSBURY, ADMR. C. T. A. OF JOHN GREEN,
DECEASED.

Orphans' Court, Kent County, March T. 1880.

*Jurisdiction of Orphans' Courts ; rights of widow who
relinquishes dower under mistake.*

1. The Orphans' Courts in Delaware have equitable jurisdiction and equitable powers in all matters coming under the cognizance of such courts to which the application of equitable principles and powers are necessary and proper for their determination, where it is not necessary that the proceedings be by bill and answer.
2. The claims of creditors are not to be preferred to those of a widow who waives her assignment of dower by metes and bounds and elects to take the devises contained in the will in her favor in lieu of her right at law, unless the provisions in her favor are so disproportionate to the value of her dower at law as would amount to a fraud upon creditors.
3. A court having jurisdiction of the subject-matter of ordering a sale of a decedent's real estate to pay debts and of the proceedings thereunder, and possessing equity powers with respect to the matters within its jurisdiction, may protect the rights of a widow who has relinquished her dower rights to permit the sale either by setting aside such relinquishment or by securing to her the benefit as against creditors of the provisions of the will in lieu of dower.
4. The rights of a widow who has relinquished her dower rights in order to permit a sale of the real estate to pay debts to have the provisions of the will in her favor in lieu of dower secured to her or to have her election set aside may be secured as well by petition and rule as by bill and answer.

Syllabus.—Statement.

5. A sum sufficient to raise the annuity provided by the will may be ordered to be invested in favor of the widow as against creditors of the estate where she relinquished her dower rights and elected to take under the will in reliance upon representations of the executors that the estate was solvent without knowing or having the means of knowing that it was insolvent.
6. The Orphans' Court in Delaware may determine the amount and the manner of investment of a sum to be invested to raise an annuity for a widow who relinquished her dower right to permit a sale for the benefit of creditors under the mistaken impression that the estate was solvent.

PETITION FOR RULE TO SECURE A WIDOW'S RIGHTS IN HER HUSBAND'S ESTATE.—Eliza Green, widow of John Green, late of Kent County, deceased, presented to the court a petition representing that her late husband executed a last will and testament and afterward departed this life leaving the will unrevoked. That the same was admitted to probate and that it devised to petitioner a dwelling-house in the town of Dover, during her natural lifetime, and bequeathed to her an annuity of \$200, payable in equal semi-annual installments, during her natural lifetime, in lieu of her dower rights, and that the will directed the payment of the annuity out of the rents and profits of real estate, until it should be sold, and that after sale sufficient of the proceeds should be secured by mortgage on real estate to secure the annuity. That the administrator was unable to sell the lands in the condition they then were and petitioned for an order of court to permit the sale, and that petitioner believing that she could not be prejudiced by so doing in order to further a sale made her election in open court to take under the will and therefore surrendered her dower rights. That since the sale petitioner has learned that the proceeds will not be sufficient to pay all debts and leave a sum sufficient to raise her annuity and she therefore prayed a rule upon the administrator to show cause why he should

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not invest a sum sufficient to raise such annuity, or that she be allowed to withdraw her election and file a waiver of her right to assignment of dower by metes and bounds and elect to take in lieu thereof an equivalent share of the proceeds of the real estate. The rule was issued in accordance with the prayer of the petition. The further facts sufficiently appear in the opinion.

Eli Saulsbury, for the plaintiff.

Charles H. B. Day, for the defendant.

THE CHANCELLOR.—John Green, in and by his last will and testament dated the 5th day of August, A. D. 1876, devised a house and lot, in Dover, to his wife during her natural life, and also gave her annually the sum of \$200, to be paid in equal semi-annual installments. He directed his executrix to rent the farm on which he lived, during the minority of his youngest daughter, and out of the proceeds therefrom to pay semi-annually to his wife the sum of \$100, which semi-annual payments were, during the minority of his said daughter by the clear intendment of his will, to constitute the said legacy of \$200. After his said daughter should arrive at age, he directed his real estate, except the house in Dover, so as aforesaid devised to his wife, to be sold at public sale, and the sum of \$3,333.33 $\frac{1}{3}$, with interest payable semi-annually, to be secured on said lands by way of mortgage. The object of this investment was to secure the payment to his widow the legacy of \$200 during her life in lieu of the payment of said sum out of the rents before the sale. The devise and bequest of the testator to his widow was expressly made in lieu and bar of dower. On the 25th day of March, A. D. 1879, the executrix in the will having previously renounced, Dr. Gove Saulsbury, administrator *c. t. a.* of the deceased, applied in due form to this court for an order to sell the real estate of

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the deceased, or so much thereof as might be necessary for that purpose, for the payment of the debts of the deceased. The petition was granted, and an order made on the 24th day of September, A. D. 1879, for the sale of said real estate, except the house and premises in Dover, so as aforesaid devised to his widow. The administrator stated in his petition, among other things, as follows: "Should the widow of said deceased elect to take under the will of her said husband, the residue of the estate would be sufficient to pay debts, but as a considerable amount of the proceeds of the real estate would necessarily have to be applied to the payment of surety debts, which are liens upon said lands, it would require the sale of all the lands not devised to the said widow in lieu of dower, to satisfy and discharge the debts due from the estate." On the same day that the order was made, the widow appeared in open court and made her election to take under the will of her husband, which election, indorsed on the petition and signed by the widow, is as follows: "And now to wit, this twenty-fourth day of September, A. D. 1879, Mrs. Eliza Green, widow of John Green, deceased, voluntarily appears in open court and elects to take under the will of her said husband in lieu of dower in the lands of said John Green, deceased." By virtue of said order, the lands of the deceased, mentioned in said order, were sold by the said administrator and return of said sale was made by him to this court on the 24th day of March, A. D. 1880. On the same day the widow preferred her petition to the court representing and praying as follows: "That believing that she could not be prejudiced by so doing, and would in any event be paid fully the annuity aforesaid, in order to enable the administrator *c. t. a.* to sell said lands unencumbered by her dower rights therein, she made her election in open court to take under the will of

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her husband. That the right to dower thereby surrendered was a full equivalent for the provision made for her in said will, and the payment to her of said annuity cannot and will not prejudice the rights of creditors of her said husband, as her dower rights would have been unaffected by liens against said lands with the exception perhaps of a recognizance in this court amounting to \$2,214.60½, with less than one year's interest thereon. That your petitioner has been informed and believes that, owing to the existence of surety debts against the estate of her said husband, the proceeds of the sale of the lands sold under the order of this court will not be sufficient to pay all debts and leave a fund sufficient to raise her aforesaid annuity, she therefore prays the court to issue a rule upon said administrator *c. t. a.*, to show cause why he should not invest in the manner directed in said will, or otherwise, the sum of \$3,333.33½ out of the proceeds of the sale of the lands sold under the order of the court, with the interest thereon, payable to your petitioner during her natural life, or to pay the said sum of \$3,333.33½ into this court for the purpose of raising the aforesaid annuity of your petitioner.

Your petitioner further represents that her aforesaid election was made under the belief that the estate would be ample to pay her annuity and all debts against the estate from the best information she could obtain from other sources, as well as the statements in the petition for an order to sell the lands for the payment of debts, and by reason of said election said lands have been sold free and discharged of dower for a much larger sum than otherwise they would have brought. She therefore prays the court in case she cannot obtain relief upon the hearing of the rule prayed for on this petition, to allow her to withdraw her aforesaid election and file a waiver of the right to assignment of dower by metes and

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bounds and elect to take in lieu thereof an equivalent share of the proceeds of the sale of the real estate as in ordinary cases of sales of real estate for the payment of debts." The rule prayed for was granted by the court and the question for us to determine is, Has this court jurisdiction and authority to grant the relief sought by the petitioner, or to afford any other relief which the circumstances alleged, if true, may seem to demand? To determine this question it will be necessary, first, to consider the jurisdiction and power of the Orphans' Court under the Constitution and laws of this State. The application is a novel one in our practice. No similar one to my knowledge has ever been presented for the consideration of the Orphans' Court in any county of this State. It seems to merit careful consideration. In the first place it is important to observe in this discussion that the three counties upon the Delaware were formerly, and for a considerable period of time, governed by the laws enacted by the Province of Pennsylvania and the territories, which territories were the three counties of New Castle, Kent, and Sussex, on the Delaware.

At an assembly held at Philadelphia, in that Province, the tenth day of the first month, March, 1683 (see Charter and Laws of the Province of Pennsylvania from 1682-1700, chapter 77, page 131), it was enacted, "That the Justices of each respective county courts shall sitt twice every year to inspect and take care of the estates, usage and employment of orphans, which shall be called the Orphans' Court, and sitt the first third day of ye week in the first and eighth month yearly; That care may be taken for those that are not able to take care of themselves." This was abrogated by William and Mary, King and Queen, in the year 1693, and was re-enacted the same year. At an assembly held at New Castle the tenth day of the third month, May, 1684, it was enacted (chapter 156,

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page 167, Pennsylvania Colonial Laws), "That Monthly and Quarterlie Sessions be held in every county in this Province and territories by the respective Justices; and that each Quarter Sessions be as well a Court of Equity as Law concerning any Judgment, given in cases by law capable of Triall in the respective County Sessions and Courts." This law was abrogated by William and Mary, King and Queen, in the year 1693, and re-enacted the same year, section 71, page 214, Pennsylvania Colonial Laws, and was supplied by law passed in the year 1701. See Bioren's Laws, volume 1, page 33. The act establishing the Orphans' Courts in this government is to be found in the first volume of the Laws of Delaware, chapter 30, page 87. The Act for establishing courts of law and equity, within this government, was enacted at the same session of the General Assembly, one of which courts was the Court of General Quarter Sessions of the Peace and Jail Delivery. Chapter 30 of the Act before referred to empowered the justices of the Quarter Sessions to hold the Orphans' Court. Under the Act establishing courts of law and equity in this government referred to, a Supreme Court was established to be composed of three judges, who, by section 7 of said Act were empowered "to hear and determine all and all manner of pleas, complaints, and causes in law or equity, which shall be removed or brought there from the respective General Quarter Sessions of the Peace, to be held for the respective counties of New Castle, Kent, and Sussex, by Writs of Certiorari, Writs of Error or Appeal, or from any other Court of Law or Equity in this government, by virtue of any of the said writs or appeal, after final judgment or decree shall be given in the said courts. By section 15 of said Act the county court of Common Pleas was established to be holden four times in every year, at the times and places where the General Quarter Sessions of the

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Peace are directed, and by section 21 a Court of Equity was established to be held by the justices of the said respective county courts of Common Pleas four times a year, at the respective places and near the said times as the said Courts of Common Pleas are held, in any county in this government. This court, thus established and thus to be held, was not an appellate court or a court of errors as the Court of Common Pleas was, "to hear and determine all and all manner of pleas, plaints, and causes in law or equity, which, or might be brought there from the respective General Sessions of the Peace," but it was a court of original jurisdiction, and the judges of the Court of Common Pleas holding it were empowered and authorized to hear and decree all such matters and causes of equity as shall come before them in the said courts where the proceedings shall be by bill and answer as heretofore. It will thus be perceived from a careful scrutiny of these acts and their provisions, that the Court of Quarter Sessions, which was empowered to hold the Orphans' Court, possessed equity powers, and of course equity powers in respect to such matters as were the subjects of its jurisdiction, and to which equitable principles could be properly applied, with the right of appeal therefrom to the said Supreme Court and not to the Court of Common Pleas, which was empowered and authorized to hold a Court of Equity, where the proceedings were to be by bill and answer. No one can doubt that the subjects cognizable by the Orphans' Court thus established, and so to be holden by the judges of the Court of General Quarter Sessions, were subjects to which equitable principles could be properly applied. If so, it follows, necessarily, that in passing upon such subjects the judges of the General Quarter Sessions sitting as the judges of the Orphans' Court, possessed equitable powers and could exercise equitable jurisdiction, in respect to all subjects properly cognizable before them as such Orphans'

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Court. The court derives its jurisdiction from the law creating it, and vesting the power of holding it in the manner described. In determining such matters as should come before it, the court had not only jurisdiction to entertain, but to hear and finally determine them without remitting a party interested to any other tribunal, or even to the Court of Equity established by said act, subject only to the right of appeal from its decisions to the said Supreme Court. The Orphans' Court thus established, and thus to be holden by the Court of General Quarter Sessions, was so continued to be holden by the said court until the adoption of the first constitution of this State in 1776, which provided in article 12, that, "the President and General Assembly shall, by joint ballot, appoint three justices of the Supreme Court for the State, one of whom shall be Chief Justice and a Judge of Admiralty, and also four Justices of the Courts of Common Pleas and Orphans' Courts for each county, one of whom in each court shall be styled Chief Justice." It will thus appear that the power of holding the Orphans' Courts was vested in the same judges as those which constituted the Courts of Common Pleas, but the jurisdiction of the Orphans' Courts was in no manner changed. Article 24 provided that "all Acts of Assembly in force in this State on the fifteenth day of May last (and not hereby altered or contrary to the resolutions of Congress, or of the late House of Assembly of this State), shall so continue until altered or repealed by the Legislature of the State, unless where they are temporary, in which case they shall expire at the time respectively limited for their duration." Article 13 of this Constitution was as follows: "The justices of the Courts of Common Pleas and Orphans' Courts shall have the power of holding Inferior Courts of Chancery as heretofore, unless the Legislature shall otherwise direct." What were these Inferior Courts of

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Chancery which the Orphans' Court had theretofore been authorized to hold? It certainly was not the General Court of Equity established by virtue of the act hereinbefore referred to, wherein the proceedings were by bill and answer, because such Court of Equity was to be held by the Court of Common Pleas, who had also independently the power of holding Inferior Courts of Chancery. I take it, therefore, that by holding Inferior Courts of Chancery as heretofore, was meant that the Courts of Common Pleas and Orphans' Courts were empowered to hear and determine the several matters within the respective jurisdiction of each according to the rules and principles both of law and equity as the same might be applicable to said matters; and that having jurisdiction of a subject-matter before them, they had authority to determine it and all questions in respect to it according to the very right of the matter, whether the ascertainment of that right depended upon principles either of law or equity; and that their jurisdiction in such case was complete and perfect for its determination, and that the parties to any such cause were not to be turned over to any other tribunal for its adjudication. And here it may be remarked, that there has never been theretofore, during the connection of the three counties on the Delaware with the Province of Pennsylvania, or, to use the language employed in the acts of that period of the Province of Pennsylvania and the territories, a separate Court of Chancery or other equitable tribunal, but all the courts of general jurisdiction exercised both legal and equitable powers; nor have there been such separate equitable tribunals since in Pennsylvania; nor was there any independent equitable tribunal of general jurisdiction in this State or Colony after it ceased to be connected with the Province of Pennsylvania, until the act before referred to passed in the early part of the eighteenth century, the precise date

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whereof is not however known, entitled, "An Act for the establishing courts of law and equity within this government." In those states where there are no courts of separate, exclusive equitable jurisdiction, as is now the case in most of the States of the Union, but where the same courts administer both law and equity, it is customary to speak of the law side and equity side of said courts, and such I take it, was the character of the Court of the General Quarter Sessions, Orphans' Court and Supreme Court, as first established in Delaware, and what is meant in article 13 of the Constitution of 1776, as Inferior Courts of Chancery, which the Court of Common Pleas and Orphans' Court should have the power of holding was nothing other in effect than the hearing and determining of matters before them on the equity side of said courts, when the application of equitable principles to their determination became necessary and proper. Under the Constitution of 1776, the same judges who held the Court of Common Pleas held the Orphans' Court for each county and determined all matters cognizable by them either according to legal or equitable principles, as the same might be applicable, but when deciding according to equitable principles and not upon legal principles, as distinguished from equitable, they exercised in the language of that constitution "the power of holding Inferior Courts of Chancery as heretofore." With such powers, and in this manner, were the Orphans' Courts in this State constituted and held until the year 1792, when a new Constitution for the State was adopted. This Constitution, section 15, provided that, "The judges of the Court of Common Pleas, or any two of them, shall compose the Orphans' Court of each county and may exercise the equity jurisdiction heretofore exercised by the Orphans' Courts, except as to adjusting and settling executors, administrators, and guardians' accounts, in which cases they shall have an appellate

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jurisdiction from the sentence or decree of the Register." Here the equity power of the Orphans' Court is distinctly recognized and its equity jurisdiction made a part of the Constitution. What the equitable jurisdiction theretofore exercised and which is continued by this section, I have already endeavored to show, viz.: that it extended to all matters cognizable before them and the determination of which depended upon the application of equitable principles, and where the proceedings were not by bill and answer. In the latter case equity jurisdiction had theretofore been exercised by the Court of Common Pleas, and not by either the Court of Common Pleas or the Orphans' Court holding Inferior Courts of Chancery. The Constitution of 1792, section 14, article 6, provides that, "The equity jurisdiction heretofore exercised by the judges of the Court of Common Pleas, shall be separated from the common-law jurisdiction and vested in a Chancellor, who shall hold courts of chancery in the several counties of this State." The equity jurisdiction here referred to included that exercised by the Court of Common Pleas theretofore, when acting as an Inferior Court of Chancery, as distinct from the Orphans' Court acting as an Inferior Court of Chancery held by them as well as theretofore exercised by the Court of Common Pleas when sitting as a Court of Equity, as provided in section 21, chapter 54, of the Act entitled, "An Act for the establishing courts of law and equity within this government," hereinbefore referred to, the powers of which courts of equity have hereinbefore been mentioned, and which are more fully described in said section.

The Court of Common Pleas continued to hold the Orphans' Court and to exercise all the jurisdiction thus given to the Orphans' Court under the Constitution of 1792, until that Constitution was amended in the year 1802, as follows, viz.: "The Chancellor shall compose

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the Orphans' Court of each county and exercise the equity jurisdiction heretofore exercised by the Orphans' Court, except as to the adjusting and settling executors', administrators', and guardians' accounts, in which cases he shall have an appellate jurisdiction from the sentence and decree of the Register." The effect of this amendment was simply to divest the Court of Common Pleas of the power of holding the Orphans' Court of each county, and of vesting the power of holding said courts in the Chancellor. The equitable jurisdiction of the Orphans' Court was expressly reserved, although it was to be exercised by the Chancellor who composed said courts with appeal from the Orphans' Court thus composed in the matters of its original jurisdiction to the Supreme Court. Thereafter the Chancellor composed the Orphans' Court, exercising its equitable jurisdiction as distinct from the jurisdiction which he exercised as Chancellor under sections 1 and 14, article 6, of the Constitution of 1792. The power of the Orphans' Courts in the respective counties of this State, after the adoption of the Amendment of 1802, as aforesaid, continued to be exercised by the Chancellor [composing said courts, until the adoption of the present Constitution of this State in 1831. That Constitution provides, section 10, article 6, that the "Orphans' Court in each county shall be held by the Chancellor and the Associate Judge residing in the county, the Chancellor being president." And "this court shall have all the jurisdiction and powers vested by the laws of this State in the Orphans' Court." This court has all such jurisdiction and power now. The question then arises, What is that jurisdiction and what are those powers? We have already seen that the original Court of General Quarter Sessions holding the Orphans' Court had from the beginning equitable jurisdiction and powers. That the Orphans' Court, when held by the judges

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of the old Court of Common Pleas, possessed equitable jurisdiction and powers. That by the Constitution of 1792, the judges of the Court of Common Pleas, or any two of them, composing the Orphans' Court of each county, might exercise the equity jurisdiction theretofore exercised by the Orphans' Court, except as to the adjusting and settling executors', administrators' and guardians' accounts, in which case they should have only appellate jurisdiction from the sentence or decree of the Register. This equitable jurisdiction under the Constitution of 1792 was both original and appellate, for that Constitution provides that appeals may be made from the Orphans' Court in cases where that court has original jurisdiction to the Supreme Court, whose decision shall be final. This equitable jurisdiction was continued in the court by the amendment to that Constitution in 1802, when the powers of the court were vested in the Chancellor, and this equitable jurisdiction and these equitable powers under the laws of this State, were, by the present Constitution of the State, vested in the Orphans' Court as now constituted. In fact there has been no period since the first establishing the Orphans' Court in this State, when that court has not possessed and exercised equitable jurisdiction and powers which may properly be termed original. In reference to what therefore may this equitable jurisdiction and these equitable powers be exercised? Reasonably we should suppose in reference to all matters coming under the cognizance of said courts to which the application of equitable principles and powers are necessary and proper for their determination, unless there be any case where the exercise of such jurisdiction and such powers have been prohibited. Is there any such prohibition in respect to the case before us? This court has jurisdiction to hear and determine the application of the administrator *c. t. a.* of John Green,

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deceased, for an order for the sale of his real estate for the payment of his debts. It had the authority to hear and consider the election of the widow to take under the will of her husband and not her dower at law. The facts stated in the petition of the administrator are before the court, as are also the circumstances under which she made her election as stated in her present petition to the court. Has any court the power to afford her the relief she asks, or granting her prayer for leave to withdraw her election, or to have the benefit of the devise and bequest made in her favor in the will of her husband, which benefit was the inducement to her of waiving her right of dower at law? If this court should be satisfied that injustice and wrong would be done the widow of holding her to her election without her being secure in the enjoyment of that benefit, has it or has it not the power to afford her the relief which she seeks, or must the court dismiss her petition and leave her either remediless or to the privilege, if she has it, of seeking for relief by a bill in equity? Has she a cause for equitable relief, and if so, can this court afford that relief? We have seen that the Orphans' Court has, and always has had, equitable jurisdiction and powers. We have indicated to what matters the exercise of that jurisdiction and the exercise of those powers may be applied. We have not been able to see any prohibition upon such exercise in respect to the matters before us, either in the Constitution or laws of the State, and hence the inquiry becomes important whether there is anything in the nature and character of the application, or of the mode and manner and means by which the relief sought can be afforded, which precludes this court in the exercise of its equitable jurisdiction and powers from affording such relief, and to this question I now address myself. And first, in what position does the petitioner stand before the Court? She is

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the widow of John Green, deceased. Surviving him, she was entitled by law to one third of his real estate, legal and equitable, as her dower therein during her natural life. She stands before the court in a different light from that of a mere legatee. She is not as a legatee a mere object of the bounty of the deceased. She is entitled to be regarded in the light of a purchaser. She surrenders a clear legal right and gives a valuable consideration for the benefit which she claims under the will. The surrender of her rights at law to dower in her husband's real estate in consideration of the devises and bequests contained in his will, has all the merits of a contract, and has by some courts been treated in the light of a contract between her and her husband. It is clear that she would not be subject to abatement of the bequests made to her in favor of mere legatees, and if the facts stated in the petition be true, there is no reason why the bequest should be subject to abatement in favor of creditors of the deceased, the truth of which facts this court has the power to ascertain, if it has the power to entertain the application at all. The petition states in substance that by her release of dower the real estate sold by the administrator sold for an amount in excess of that for which it would have sold if her right of dower by metes and bounds had not been released by her election equal to the amount which she claims shall be reserved out of the proceeds of the sale, and not be applied by the administrator to the payment of debts during her lifetime, but invested so as to raise the amount of her annuity. If so, no creditor of the deceased would or could sustain loss, but would in fact be benefited, because such excess of sale caused by her election to take under the will would, after her death, be applicable to the payment of any unsatisfied debts against her husband's es-

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tate. If, however, she is to be held to her election, and to be subjected to a diminution of her annuity, she will be the loser to the amount of that diminution, although she surrendered a valuable consideration for her whole annuity, and thus the creditors would receive the benefit to which they would not have been entitled but for her election. Would this be just or equitable as between her and the creditors. At most, the payment of their claims would only be postponed to a future period, while she would suffer a present and a continuing loss. It may be said that a testator is bound to be just before he is generous, and that creditors who have legal rights are not to be postponed to the mere objects of the testator's bounty. The petitioner, if the facts alleged in the petition are true, is not affected by this principle. She was not the object of the testator's bounty. She was a purchaser for a valuable consideration, the surrender of her rights to dower at law in his real estate, in consideration of the devises and bequest in her favor contained in the will. She cannot be deprived of the benefits secured to her by the will by the claim of any one not possessing an equity superior to her's. It has been decided again and again, that a widow, under such circumstances as exist in this case, is not subject to the abatement of a legacy in her favor in relief of mere legatees, and I hold it to be true that the claims of creditors are not to be preferred to those of a widow who waives her assignment of dower by metes and bounds and elects to take the devises contained in the will, in her favor, in lieu of her right to dower at law, unless where the provisions made for her in the will in her favor in lieu of dower is so disproportionate to the value of her dower at law as would amount to a fraud upon creditors. I shall do nothing further than to quote from two adjudged cases in support of these positions

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and append in a footnote* to this opinion, a reference to a few cases where the learning upon this subject may be consulted. In the case of *Isenhart v. Brown*, 1 Edw. Ch. 411, 6 L. ed. 190, it was decided by the Vice-Chancellor of New York, that a bequest in lieu of dower, and the acceptance of the same, amounts to a matter of contract and purchase, and the wife is to be paid the bequests in preference to other legacies and without abatement. In this case the Vice-Chancellor says, "the legacies given to her (the widow) by this will are partly specific and partly pecuniary, and they constitute the provision made for her by the testator in lieu of her right of dower in his estate. It is the price put by the testator himself upon that right and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view she becomes the purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and if she agrees to the terms she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them, and what she thus becomes entitled to receive is not by way of bounty, like other general bequests, but as purchase money for what she relinquishes and which consequently must be paid in preference to other legacies." Then, after reviewing a number of cases on the subject the Vice-Chancellor says: "Considering all these cases I am bound to regard the law as settled, that under circumstances like the present a widow is entitled, after

* NOTE.—*Buttricks v. Broadhurst*, annexed notes, 1 Ves. Jr. 171; *Wake v. Wake*, 1 Ves. Jr. 335; *Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. Sr. 420; *Devenhill v. Fletcher*, 1 Ambl. 244; *Heath v. Dendy*, 1 Russ. 543; *Isenhart v. Brown*, 1 Edw. Ch. 411, 6 L. ed. 190; *Hall's Case*, 1 Bland, Ch. 205, 17 Am. Dec. 275.

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payment of the debts, to the whole provision which the husband chooses to make for her by his will in lieu of dower, in preference to all other legatees who are consequently to be postponed where there is a deficiency of assets. Of course the debts must be paid before she can be entitled even to specific legacies." I quote these last observations of the Vice-Chancellor not to adopt them, but to express my dissent from them so far as they convey the idea that a widow is not entitled to the provision made for her in a will in lieu of dower, until after payment of the debts of the testator, and I say "of course" this is not true where the value of her right of dower relinquished in consideration of the devises and bequests in the will is of equal value with that of such devises and bequests. And why? Because the right of dower which she relinquished in her husband's real estate, was not subject to, and could not be made subject to, the payment of the debts due by her husband, and his creditors could have no claim upon the proceeds of the sale arising from lands to which she was entitled as dower, without her relinquishment of dower thereon, and she taking under the will of her husband, property only equal in amount in value to the right of dower as relinquished, and taking as a purchaser and not through the bounty of the testator, it would be inequitable to postpone her rights under the will to the claims of her husband's creditors. In support of the view thus presented I refer to *Margaret Hall's Case*, 1 Bland, Ch. 203, 17 Am. Dec. 275, in which it was decided that a widow who elects to take the estate devised to her in lieu of dower is to be deemed a purchaser for a fair consideration to the value of her dower, and must have her claim sustained as a lien to that extent in preference to creditors. As this case is very similar in its facts to the one before us, I will give it in full. The case is reported thus: "This case arose

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upon a creditor's bill filed on the 5th of October, 1825, by George Mackubui and Margaret Hall, the widow and executrix of Joseph Hall, deceased, against his devisees, Samuel Matthews and others, alleging that his personal property was insufficient to pay his debts, and praying that his real estate might be sold for that purpose. A decree was passed on the 30th of June, 1826, for the sale of the realty accordingly; and the trustees reported that he had made sale of a part of it, which was finally satisfied on the 1st of March, 1827. On the 1st of March, 1827, the plaintiff Margaret, by her petition stated that her late husband had, by his last will, devised to her a large portion of his estate, to hold a part during her life and another part for a term of years; that she had elected to take under the will of her husband immediately after his death when she was unacquainted with his affairs; but that it is now ascertained that the claims against his estate will absorb so much of it as, if paid to her exclusion, will deprive her of all benefit intended by the will, and leave her in a much worse situation than if she had rested altogether upon her common-law rights. And therefore, as her election was improvidently made, and at the time when she was destitute of the information which alone could enable her to act knowingly upon the subject, she prays that it may be annulled that she may be allowed the value of her dower, or be relieved according to the nature of the case, etc." . . . The Chancellor said: "The will of the deceased husband of this widow lay before her and presented to her a choice between the estate therein bestowed and that given by the law. In her election to take under the will there is no apparent room even to suspect fraud, nor has the existence of any been intimated; and it is difficult to perceive how there could have been any mistake. But supposing it possible to show that a mistake had occurred,

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I should require from her a strong and clear case of misapprehension. She has heretofore formerly made her election in the manner prescribed by law, and has solemnly re-affirmed that choice by bringing this suit. An election thus deliberately made, repeated and adhered to, ought not to be lightly shaken or easily annulled. This widow must therefore be held firmly bound by her election, and can have no relief but such as may be altogether compatible with the choice she has thus made. A devise which is merely of the nature of a donation or that appoints persons to take as heirs, in place of those designated by the law, must certainly be considered as void against creditors. But a devise in lieu of dower is one of a different character and of much higher merits. It discharges a highly favored debt due from the testator; it relieves his real estate from a lien imposed by law in favor of his wife in preference to all others with which he himself could have encumbered it by any contract of his own. In the language of the Act of Assembly, a widow electing to take under the will of her husband is to "be considered as a purchaser with a fair consideration." It is clear, therefore, that this devise is fraudulent as against creditors, only as far as it exceeds the value of the dower in lieu and discharge of which it was given and has been accepted. The creditors have associated themselves with the widow and devisee of the deceased, and have asked to have the real estate sold for the payment and satisfaction of all. But these creditors now, it seems, propose to have their claims first satisfied in preference and exclusion of the devise to the widow. They who are the widow's opponents would thus bind her to her election to take under the will which satisfied her claim that had a preference over theirs; and yet they would leave her to take by that devise nothing, or less than the amount of her legal claim. This cannot be

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allowed. They who ask equity must do equity. These creditors must either permit the widow to take the whole amount under the will, as is her choice, or allow her to obtain full satisfaction for her dower; because to the value of that at the least, she is both at law and in equity "a purchaser with a fair consideration," and to that extent therefore the devise must be sustained. The widow is clearly entitled to one or the other, either the devise or the dower, and since her taking the whole of the subject devised, which was and is her choice, has been objected to, she must be allowed to take as devisee to the full value of her dower which she has relinquished, but no more.

The Chancellor made the following order, viz.: "Therefore, it is ordered that the said Margaret Hall be, and she is hereby allowed, one-seventh part of the proceeds of the real estate in the proceedings mentioned in bar and satisfaction of all that portion of the real and personal estate devised to her by her late husband, Joseph Hall, and which property so devised she had elected to take in lieu of her dower."

This case was decided in Chancery for the reason I suppose that, under the law and practice of Maryland, the Court of Chancery alone had jurisdiction to award a sale of the realty of a deceased person for the payment of his debts where the sale of the realty became necessary for such purpose. The course to be pursued was by a creditor's bill against the devisees and others claiming the land when a decree was made for the sale of the land. Of course it became necessary to make return of the sale to the court which had made the decree for the sale, and every claim upon the proceeds of sale had to be presented to that court, and might be as was done in this case, by petition by the claimant. The principle applicable in this respect to the present case and to all similar cases, is,

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that the court vested with the power of ordering the sale, and to whom a return of the sale must be made, and which has authority in respect to confirming or refusing confirmation of sale, and of course in case of refusal of confirmation to order a return of the purchase money to be made to the purchaser—in short the court having jurisdiction of the subject-matter of sale, and the proceedings thereunder, and more especially when such court possesses equitable powers in respect to matters within its jurisdiction, has authority as a necessary incident to the exercise of its jurisdiction, to pass upon all matters either legal or equitable, necessary and proper to a just determination in respect to those matters, unless there is some limitation to the exercise of its powers imposed by law, or unless it finds itself inadequate to do complete justice between contending parties, and can remit such parties to some other tribunal where justice can be more effectually administered. In the case before us the claim of the petitioner being just and equitable in its character, so far as not to be prejudiced by her election, this court ought not to subject her to the expense and delay of making application by a bill to the Chancellor for relief in equity if this court can itself grant the relief to which she is entitled. And why can it not? The extent of the equity claimed would be the same in either court. The relief sought may be afforded as well upon petition and rule as by bill and answer. In the case already cited in *Bland*, relief afforded to the widow was upon petition after sale made, and the bill mentioned in that case in equity was simply to obtain an order for the sale of the lands, which, under the law of Maryland, and the practice in the courts of that State, seems to have been necessary, although not necessary where the question related simply as to the application of or right to the fund. In the present case the order of sale was obtained, not on bill in equity after

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answer thereto by persons claiming the real estate as in the case in Maryland, but upon petition to the Orphans' Court, having jurisdiction to make the order, and upon notice to the heirs or persons interested in the real estate. The proceeds of sale being in the hands of the administrator subject to the order of the court and to the payment of the debts of the deceased, so far as the fund shall be ascertained to be applicable, can there be any doubt as to the right of the court to determine whether such fund is subject to any equity or rightful claim paramount to that of creditors? The measure of proof would be the same in one court as in the other, and the mode and manner of proof is not necessarily dissimilar. I am, therefore, of the opinion that this court has ample authority to determine the questions arising upon this petition; and that it is the only tribunal which ought to pass upon those questions. Whether it ought to grant either one of the prayers of the petitioner depends upon the truth of the facts alleged therein. Some of those facts we know by the record. We know that the sale was made, the amount of the sale, that it has been returned to this court by the administrator, the statements made in the petition of the administrator for obtaining the order of sale, the election of the widow to take under the will indorsed on the petition, and there is nothing in the case to show any fraud on her part, or on the part of any one else, and we have no reason to believe from anything before us that she had, or could have had, any knowledge in respect to the condition of the estate other than that obtained from the petition upon which the order was made. Did she, by electing to take under the will of her husband and thereby waiving the assignment of her dower by metes and bounds, surrender or give an equivalent for the interest on the sum of \$3,333.33 $\frac{1}{3}$, which sum she now asks may be invested or secured so that the semi-

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annual interest thereon be paid to her during her life according to the direction of her husband in his said will.

There is no doubt that in a case arising in the Court of Chancery in which the right to elect between two interests, or to revoke an election already made and to be remitted to rights waived upon election, that the court would feel itself compelled to decide in conformity to the long train of decisions on the subject, that before a party can be compelled to elect, such party would be entitled to be informed fully in respect to his or her interests and to the situation of the estate or funds in respect to which they might arise, and for that purpose to have accounts taken in that court. According to the English law, and the same is doubtless true in this country wherever the question has arisen in Chancery, before a widow can be compelled to make her election between her right of dower at law and a devise in lieu of dower, she is entitled to be fully informed of the comparative value of the two rights or subjects-matter of choice. This principle is one of such obvious fairness that I know of no case in which the contrary thereof has been judicially held. Other circumstances, however, besides an accurate knowledge of the comparative value of the two things which are the subject of election may be sufficient to bind; but, as has been well remarked, these circumstances (whether arising out of original intention, acquiescence in the acts of others, or the effect of acts of the party having the right of election on the interest of third persons), must be so infinitely varied and modified in different cases that no rule applicable to all can be laid down; each must be determined on its own particular grounds. In the case of *Wake v. Wake*, 1 Ves. Jr. 335, it was decided that the receipt of a legacy and annuity under the will, for three years, did not prevent her right of election being presumed not to have acted with full knowledge which would bind her.

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I conceive it to be settled law, that acts done by a party before he or she is fully informed of his or her rights will not, generally speaking, amount to an election; and where an election has in fact been made, as in this case, without full information and without the means of full information, I conceive it would be inequitable to hold a widow to such an election if no other relief than allowing her to revoke it could be afforded. And if such revocation, under proper circumstances, can at all be made as the authorities show, it certainly ought to be made in the tribunal in which the election was made. What jurisdiction has any other court to allow a revocation to be made? As to revocation itself, what authority would a Court of Chancery have to compel this court to allow it? An appeal from this court does not lie in the Court of Chancery, but only to the Superior Court when the opinion of the judges composing the Orphans' Court are opposed. Now, in a case where revoking an election ought to be allowed in order that justice and right should be done, and this court should refuse to allow such revocation, I submit that the Court of Chancery would be powerless to afford relief. This is the only tribunal in which such revocation could be made, and that the right of revocation does exist where equitable circumstances demand it, cannot be questioned in view of the uniform rulings of courts upon that subject. In this case the widow made her election in this the only tribunal in which the right of election is provided for under the statute. The order for sale free of dower was made by the court, the sale has been returned to the court and it now appears that the election was made by the widow without full knowledge of the condition of the estate as she alleges, and without the opportunity for such knowledge; but upon the faith of the statements contained in the petition made by the administrator upon which the

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order of sale was obtained, statements doubtless believed at the time by all parties to be true. The proceeds of sale are in the hands of the administrator. Do not the equities of the widow attach to those proceeds and fasten them as against creditors in the hands of the administrator during the life of the widow? And if so, cannot this court make an order that the administrator shall reserve out of the clear residue of sales a sum sufficient to satisfy the equitable lien upon them, and apply only the balance of said proceeds in discharge of the debts of the deceased during the lifetime of the widow? I think it may. The principle of the sum so reserved would, however, after the death of the widow, belong to the administrator, and be in his hands to pay any unsatisfied debts of the deceased, and in case there were no such debts, to be paid by him to the parties respectively entitled to receive it under the will of the deceased. It may be true that the administrator and the widow may have a right, either separately or conjointly, to apply to the Court of Chancery for an order as to how, in what manner, and in what funds, the said sum so reserved by order of this court may be invested, treating it as a fund burdened with an equity, or in the absence of any order of any court having jurisdiction in respect thereto, I see no objection to its being retained by the administrator and safely invested by him as such administrator to raise the annuity for the widow during her life, and afterwards to be applied according to law. Nor do I see any objection to this court making such order, the whole subject-matter of the sale and the rights of the parties being before it. It is true, no statute of the State expressly gives the authority to this court to make the investment, but the court being one of equity powers in respect to any subject-matter within its jurisdiction, and calling for the application of equitable principles, and in view of the

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positive legislation of the State in respect to securing the rights of the widow in the proceeds of her husband's real estate, when the same shall be sold for the payment of his debts, she waiving her right to an assignment of dower therein by metes and bounds, and electing to take in lieu thereof the interest on one third of the proceeds of sale, and the statutory authority of the court to secure such third part so that the interest may be paid to her during her life, I do not think that this court would be transcending its fair, legal and constitutional authority to order a proper investment of the sum, but it would be acting within the spirit and intention of the law in such cases in granting the prayer of the petition in this respect. "*Qui hæret in litera, hæret in cortice.*"

Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. *Elliott v. Peirsol*, 26 U. S. 1 Pet. 340, 7 L. ed. 170. I take the principle to be this, that where a court has jurisdiction of the subject-matter, having the right to decide every question occurring in the cause, the correctness of its decision in respect to any such question can only be inquired into upon a writ of error or upon an appeal therefrom. In this case no writ of error would lie, and an appeal, and that to the Superior Court only for the county, in case the opinions of the judges composing this court should be opposed, could be taken. This should only make us the more careful of the propriety and correctness of the decision we shall make, but it should make us equally careful not to avoid the exercise of a jurisdiction which

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we rightfully possess, and not to remit the determination of a question to another tribunal possessing no jurisdiction, or at best only a doubtful jurisdiction, in respect to it either original or appellate.

If it be true that a widow is entitled to revoke her election, to take the devises and bequests in her husband's will in lieu of her legal right to dower in real estate, and if such revocation of election can only be made in the court in which the election was made; and if it be true that the widow should be remitted either to her right at law, as if such an election had never been made, or should be compensated by a just equivalent out of the proceeds of the sale of the real estate under an order of sale for the payment of debts,—it would seem that the court in which the election was made, or the right to revocation of election or of just compensation instead thereof, is, and should be, the proper court to ascertain and determine the amount or extent of that compensation. Such amount being thus ascertained and determined not being a sum awarded absolutely in gross as absolute property, but only the annual interest upon such sum, it would be proper to preserve the principal sum for the benefit of those who might be entitled to it after the interest thereon should be no longer payable to the widow. If the court in which the proceedings for the sale of the real estate were, was necessarily the Orphans' Court, and if that court possesses, as we have seen, equitable powers, and if it has jurisdiction of the cause before it, and if, as we have seen, that a court having jurisdiction of a cause has a right to decide every question which occurs in such cause, it would follow reasonably that the Orphans' Court is the proper tribunal to decide in respect to the safety and security of such principal sum, and that, if in the judgment of the court the investment of the principal sum should be necessary or proper for such security or

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safety, then said court would have the authority and should order the investment. If the petitioner in this cause is entitled in law or equity to interest on such share of the proceeds of sale of the real estate of her husband as would be an equivalent for her dower, she not being debarred thereof by her election, she would, I submit, be brought within the spirit and equity of the Act of March 26, 1869, and this court would be invested with the authority contemplated in that Act. The Act consists of one section (see Code, 557), which is as follows: "That hereafter upon the return of a sale of real estate by any executor or administrator to pay the debts of the decedent, pursuant to section 4 of chapter 90 of the Revised Statutes of this State, in cases in which the widow of the decedent is entitled to interest on a share of the proceeds of sale as an equivalent for her dower, the purchaser may, at his election, either secure such share pursuant to the provisions of the said section, or he may pay the same into the Orphans' Court, in which case the said share shall be invested or otherwise secured under the direction of the said court for the benefit of the parties interested in the same."

In this case why may not the administrator, who himself, by leave of the court, has in fact become the purchaser, pay the sum which the court may adjudge equitable, into the court, to be invested or otherwise secured under the direction of the court for the benefit of the parties interested in the same?

It appears by the return of sale made by the administrator that the sale of the real estate amounted in the aggregate to the sum of \$11,946.00, one third of which would be the sum of \$3,982.00, the annual interest upon which would be \$238.92, which sum annually during her life would be more than an equivalent for the annual interest on the sum of \$3,333.33 $\frac{1}{3}$ —to wit, \$200—which

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the petitioner asks may be secured to her. The petition of the widow states that the real estate of the deceased in which she was entitled to dower was not incumbered by any lien paramount to her claim, unless perhaps the lien of a recognizance in this court amounting to \$2,214.-60½, with less than one year's interest thereon. If the amount so due on said recognizance be deducted from the aggregate amount of the sales at the time of her election to take under the will, it would leave a balance of about \$9,598.54, one third of which would be \$3,199.-51½, the annual interest on which would be \$191.97, being \$8.03 less annually than the sum of \$200, to which the widow claims to be entitled. The deceased also, in his will as a part of the consideration for his wife's relinquishment dower, devised to her a house and premises in Dover. What would be a fair annual rental for said house and premises we do not know, nor can we tell whether two third parts of such rental value should be considered in determining the proportion of the amount of sales which should be reserved for the benefit of the widow, nor do we know whether the amount of said recognizance should be taken into consideration by us as at present advised.

These matters are subject to proof which may hereafter be presented to us, and in respect to which no opinion is expressed further than to say, that the court would not be warranted in concluding that the devise and bequest to the widow in lieu of dower was a fraud in respect to creditors, or so unjust to them as to justify the court in any manner disturbing or lessening it. I think, therefore, that the widow should amend her petition and rule by leave of the court, so as to make the creditors of John Green, deceased, co-defendants with the administrator in said rule, and that the rule should be served upon the creditors commanding them to ap-

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pear in court by a certain day therein to be named, and show cause why the prayer of the petition should not be granted, so far at least as said prayer relates to the investment of the sum of \$3,333.33 $\frac{1}{4}$, under the order of this court. I express no opinion at present in respect to the alternative prayer of the petition for leave to revoke the election already made under a misapprehension of facts, other than to say that that part of the prayer should not be allowed if that which is equitable and right toward the widow can be otherwise effected.

APPENDIX B.

BENJAMIN BURTON

vs.

GEORGE W. WILLEN *et al.*

Sussex, March T., 1872.

Advances by maker of recognizance to obligee—right to set-off—next of kin acting as guardian—proof of insolvency.

1. The maker of a recognizance who has by advances paid obligee the full amount due has no standing in a court of equity to enjoin an action at law on the recognizance since he has a complete defense at law by pleading payment in such action.
2. An executor who has voluntarily acted as a parent to a daughter of the testator cannot hold her on a promise made after her majority to allow advances made to her upon a recognizance which he owed her in another capacity when he neglected to inform her that property to the extent of several thousand dollars which was shown by his last executor's account to be in his hands for distribution to her has been dissipated in paying debts of deceased and in advances to her.
3. A relative of an orphan who without authority from the court assumes the position of guardian for it and not only exceeds its income but nearly exhausts its principal in paying current expenses, will not be aided by a court of equity to set off his liability upon a recognizance which he owes to it and which is in the hands of her assignee for value upon advances which he has personally made in the payment of expenses.
4. Before equity will decree the repayment of money advanced to pay for articles purchased by an infant, the one making the advances must show that the articles were necessities.
5. An open and unascertained account must be settled and established in a court of law before a court of equity will set it off on a fixed and ascertained indebtedness due on a recognizance.

Syllabus.—Statement.—Attorneys' names.—Opinion.

6. Insolvency is not shown by the fact that one is under execution process in favor of one creditor and threatened with suits by others.

INJUNCTION BILL.—The bill seeks to enjoin the prosecution of a suit by George W. Willen as assignee of Virginia C. Truitt and George T. Truitt, of an action to enforce complainant's liability on a recognizance.

The facts are stated in the opinion.

Jacob Moore, for complainant.

T. F. Bayard and *C. M. Cullen*, for defendant.

RIDGELY, CHANCELLOR AD LITEM:—At the September Term, 1855, of the Orphans' Court for Sussex County, Benjamin Burton, the complainant, accepted parcel No. 5 of the intestate real estate of his mother, Polly Vessels, who had died in the year 1833, and on the 20th day of September, 1855, entered into a recognizance in the said Orphans' Court with John H. Burton and Peter R. Burton as his sureties conditioned for the payment to the other parties entitled of the sum of \$2,430.73, with interest from the said 20th day of September, 1855. Virginia C. Truitt, then Virginia C. Burton, one of the defendants, being a granddaughter of the said Polly Vessels, deceased, and one of her heirs-at-law, was entitled to the sum of \$173.41, with interest from the 20th day of September, 1855, as her part and share of the said recognizance. The said Virginia was the daughter and only child of David Burton, who died on the 25th day of June, 1855, prior to the time when said recognizance was entered into, and at the time of her father's death she was between five and six years old, and at the time of said recognizance she was about six years and twenty-two days old. Her mother had died shortly previous to the death of her father. On the 9th day of August,

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1870, she intermarried with and became the wife of George T. Truitt, a defendant in this suit, and was then an infant under the age of twenty-one years, but on the 21st day of the same month of August, 1870, she attained her majority. On the twenty-first day of April, 1871, the said George T. Truitt, the husband of the said Virginia, assigned on the record of said recognizance all his said wife's share and interest therein to George W. Willen, the other defendant, who on the 29th day of September, 1871, commenced in the Superior Court for Sussex County an action of *scire facias* wherein the State of Delaware, for the use of George T. Truitt and Virginia C., his wife, in right of said Virginia C., now for the use of George W. Willen, was the plaintiff, and Benjamin Burton, John H. Burton, and Peter R. Burton were the defendants to recover the part or share of said recognizance to which the said Virginia had been entitled and which had been assigned by her husband to him as aforesaid. The bill of complaint was filed March 11, 1872, by Benjamin Burton, the complainant, against George W. Willen alone, to restrain him from proceeding any further in his suit of *scire facias* in the Superior Court, and to enjoin him from the collection of the share in the said recognizance, which had been assigned to him by George T. Truitt—a preliminary injunction had been previously issued on petition filed by Burton against Willen. The answer of Willen was filed June 26, 1872, and further answer filed September 13, 1872, and further additional answer September 26, 1872, and afterwards depositions of witnesses were taken for the complainant and respondent. On January 3, 1876, an order was made by the then Chancellor *ad litem* that the complainant amend his bill so as to make George T. Truitt and Virginia C., his wife, parties in this cause, and on the 19th day of September, 1876, the amended bill making

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the new parties defendants was filed, and on the 9th day of December, 1876, George T. Truitt and Virginia C., his wife, the new parties, defendants, filed their joint and several answer.

By an agreement in writing, dated January 6, 1877, and signed by the respective solieitors for the complainant and respondents, it was agreed that all the testimony taken in this cause when Willen alone was respondent, except that of Truitt and wife, should be deemed and considered as evidence between the present parties in this cause, and that the testimony of said Truitt and wife be considered evidence as between Burton and Willen the same as before the making of new parties, but that said agreement should not affect any exceptions theretofore filed against witnesses and evidence. The cause was argued on the 1st and 2d days of December, 1881, on bill, answers, depositions, and exhibits.

The prayer of the bill in substance is that the defendant, Willen, be perpetually enjoined from proceeding any further with his said suit of *scire facias* on said recognizance, and from assigning the said recognizance or any part thereof to any other person and for general relief. The grounds stated in the bill of complaint for the relief prayed for briefly are that the complainant from the time of the death of the father of the said Virginia until her marriage with the said George T. Truitt, supplied the said Virginia with clothing and paid her board; that he advanced and paid to her at different times various sums of money to pay her traveling expenses to and from school and to supply her necessary and proper wants; that he sent her to school and paid for her education; that he furnished her with and paid for such clothing as was proper and becoming to her station in life, and that the articles so furnished and paid for by him and the money advanced and paid by him for her board, educa-

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tion, and traveling expenses were proper and necessary and suitable to her station in life; that the said Virginia, after she arrived at years of discretion but before her majority, repeatedly promised the said complainant that she would when she arrived at age pay him for all his expenses and advances made by him for her use and benefit, or would allow him the same in a settlement she would have with him after she became of full age; that after the marriage of the said Virginia and after she had attained full age, to wit, in the month of November, 1870, the complainant having drawn off his account against the said Virginia, submitted the same to her and her husband, and went over the same with them, explaining each item of the account, and that the said Virginia and her husband expressed themselves satisfied with the same, and said it was correct and promised to pay or allow it when they should have a settlement with the complainant; that they both distinctly declared the complainant should never lose anything by reason of the money paid and advanced by him for the said Virginia during her minority; that the said admissions, approvals, and promises to pay were made more than once, and that in the same interview in a further conversation had between the said complainant and the said George T. Truitt, the said Truitt did further and in the presence of his wife promise the complainant that the amount of said account should be allowed and go especially as a credit and payment to the full amount thereof on and to the said share of his wife in said recognizance.

The bill further alleges that at the time of the interview between the said complainant and the said Truitt and wife and at the time of the assignment to said Willen, said account with its interest amounted to as much or more than the said Virginia's share of said recognizance, and that the said complainant does not owe to said George

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T. Truitt in right of his wife or to the said George W. Willen as his assignee said share of said recognizance or any part thereof, the same having been wholly paid by the complainant before said assignment.

The bill also charges that Willen, before the assignment to him, had notice that the complainant had an account against the said Virginia which was a set-off, and payment of her share of said recognizance, and further charges that the consideration paid or promised to be paid by Willen to Truitt for said assignment was much less than the share assigned.

The answer of Willen denies all knowledge on his part that the complainant had supplied the said Virginia with clothing and necessaries, and had made advances of money to her, and had paid for her education, support, and maintenance, except that while he, Willen, was in the mercantile business he had sold some articles to the complainant at different times, which the complainant represented to be for the use of the said Virginia, but that the value of said articles did not in the aggregate exceed the sum of forty dollars; he further denies any knowledge on his part, before said assignment, that the complainant had any account against the said Virginia for necessaries furnished to her, or that the complainant held any account against the said Virginia which was a set-off, and payment of her share of said recognizance. He admits the service upon him on the 24th day of April, 1871, three days after the assignment, of a written notice from the complainant that he, the complainant, had paid to the said Virginia both the principal and interest of her share in said recognizance and that he, the complainant, would resist the collection of it on the ground that it had been fully paid and satisfied; he also sets forth in his answer the consideration he agreed to pay Truitt for the assignment, and states how the same was secured to Truitt, and

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when and how paid. The answer of Truitt and wife admits that the complainant, during the minority of the said Virginia, did furnish her with clothing, and paid for her board, education, and support; admits that after the marriage of the said Virginia, and after she had arrived at age, the complainant called upon her and her husband at the house of John P. Burton, and there produced what he called an account against her and asked her to allow it in settlement and payment of her share of the said recognizance, but that both she and her husband positively refused to allow it in settlement of her share in said recognizance and they stated to the complainant that their business was in the hands of C. M. Cullen, Esq., for settlement and adjustment, and referred the complainant to him as their attorney. They further state in their answer that the complainant had in his hands, as executor of the said David Burton, father of the said Virginia, money due to the said Virginia from her father's estate more than sufficient to reimburse the complainant for all advances made to her and for all money paid by him for the education, clothing, support, and maintenance of the said Virginia during her minority; that while the complainant was making such advances for the said Virginia during her minority she believed that they were made out of monies in his hands as executor of her father, which belonged to her under her father's will, and that she never knew of the indebtedness of the complainant to her in said recognizance until the interview at the house of John P. Burton.

It may assist us in the proper consideration of this case to notice briefly the condition of the parties at the time of the death of David Burton, and at the time of the assignment to Willen by Truitt of his wife's share in said recognizance as shown by the evidence and exhibits in the cause. David Burton died in June, 1855, having

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previously made a will by which he devised and bequeathed all his real and personal property, after the payment of debts, to his only child, Virginia C., and her heirs and assigns forever, but in case the said Virginia should die before she should arrive at the age of twenty-one years or without an heir or heirs lawfully begotten of her body, then all of the said real and personal property should go to his three brothers, Benjamin Burton, John H. Burton, and Peter R. Burton, their heirs and assigns forever, and he nominated his brother Benjamin Burton as his executor. The said David Burton at the time of his death was seised of an undivided moiety of a lot of land of about two acres, with a tan yard and a dwelling house thereon, situated in or near Millsboro, in Sussex County, also of a store house in said town of Millsboro, and also of a farm containing about 160 acres of land situated in Indian River Hundred, in Sussex County, which together were worth at that time about three thousand dollars, and yielded an annual rent of about two hundred and fifty or three hundred dollars.

The said David Burton at the time of his death was also possessed of a considerable personal estate, the value of which, however, is not stated in the evidence. On the 2d day of December, 1877, Benjamin Burton, the complainant in this suit, as the executor of David Burton, passed before John Sorden, then Register of Wills for Sussex County, a first testamentary account on the estate of the deceased, by which it appears that he then had in his hands, as executor, the sum of twelve hundred and eighty-seven dollars and sixty-one cents, and on the 1st day of June, 1860, he passed before the said Register of Wills a second testamentary account showing an unappropriated balance in his hands, as executor, of the sum of two thousand, three hundred and thirty-five dollars and fifty-one cents, and up to the time of the com-

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mencement of this suit he had passed no other account on the estate of the said deceased. The complainant, according to the evidence, was also in receipt of the rents from the real estate of which David Burton died seised, from the time of his death until the first day of January, 1870, a period of more than fourteen years, and had during that time expended but little in repairs to the real estate. The said Virginia was also on the 20th day of September, 1855, entitled as one of the heirs-at-law of Polly Vessels, her grandmother, to an interest or share in four several recognizances in the Orphans' Court for Sussex County, the aggregate amount of her share or interest in the said four recognizances being the sum of ten hundred and eighty dollars and forty-six cents with interest thereon from the date of said recognizance, viz., September, 1855.

Such was the apparent condition of affairs at the time of the assignment to Willen and at the time of the commencement of this suit, and the said Virginia was then apparently worth in real and personal property more than six thousand dollars, exclusive of any accumulated interest. It seems, however, that on the 18th day of April, 1874, about three years after the said assignment to Willen, the complainant, as the executor of David Burton, deceased, passed before the Register of Wills a third testamentary account on the estate of the deceased, by which he showed an overpayment of one thousand and ninety-seven dollars and eighty-one cents, and it was stated and admitted in the argument that since the passage of said third testamentary account and pending the present litigation all the real estate of which the said David Burton died seised had been sold by his executors under an order of the Orphans' Court for Sussex County for the payment of debts due from said deceased.

I think it clearly established by the evidence that the

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complainant paid for the board, clothing, maintenance, and education of the said Virginia, if not from the time of the death of her father till her marriage, at least for the greater part of that period. I also think from the evidence that the defendant, Willen, at the time of the assignment to him, had notice that the complainant was making a claim against the said Virginia for advances of money made by him for her use and benefit during her minority, and that he was making an effort to get such claim allowed by Truitt and wife in payment and settlement of his indebtedness to her on said recognizance. In fact Willen admits that while he was in the mercantile business he at different times sold articles to the complainant which were represented at the time to be for the use and benefit of the said Virginia, not exceeding in the whole, as he says, forty dollars in value. C. M. Cullen, in his testimony in behalf of the complainant, says that Willen, before the assignment, knew of the claim made by the complainant because he (Cullen) had informed him of it. I think this testimony with other circumstances proven in the cause outweighs the denial of notice in Willen's answer. I also think that Willen, the assignee, was a purchaser of Virginia's share of said recognizance bona fide and for a valuable consideration, which is fully set forth in his answer and also proved by some of the witnesses examined on his behalf. The question for the consideration of the court is whether the complainant is, under all the circumstances of the case, entitled to relief in a court of equity for the money paid, advanced, and expended by him for the said Virginia during her minority as against her share in the said recognizance which has been duly assigned to the said Willen as aforesaid, and whether this court shall interpose to stop the suit at law brought by Willen, the assignee, to recover said recognizance. The complainant

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in his bill claims to be relieved from the payment of the recognizance on two grounds: first, that the money so paid, expended, and advanced by him for the use and benefit of the said Virginia during her minority was a payment of the said Virginia's share of said recognizance; and, secondly, that if not a payment he is entitled in equity to set it off even as against Willen, the assignee. In regard to the first ground, it need only be said that if the money advanced by the complainant for the use and benefit of the said Virginia be considered as a payment of her share in the said recognizance, then the complainant has a full, adequate, and complete remedy in the court of law, and has no status on this ground in a court of equity. He certainly could plead payment in the action of *scire facias* brought against him in the Superior Court for Sussex County. Authorities on a point so clear as this are scarcely needed, but the case of *Conner v. Pennington*, 1 Del. Ch. 177, may be cited as bearing directly on the point. As in that case so in this the complainant had full knowledge of all the payments made by him, if, indeed, they may be so considered, and the proof of them is in his own power, and if he have any defense at all on the ground of payment, it is full, ample, and complete in the court in which the action of *scire facias* was brought, and he could in said court avail himself of the benefit thereof.

Let us now consider the right of the complainant, under all the circumstances of the case, to invoke the aid of a court of equity to enable him to set off his claim against the said Virginia's share of the recognizance, which has been assigned to Willen.

Much stress was laid by the complainant's solicitor, in his argument, upon what he termed the special agreement made by Truitt and wife with the complainant at the house of John P. Burton about the month of November,

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1870, after Truitt's wife had attained her majority and before the assignment to Willen, to allow the claim of complainant as a payment of or a set-off to the said Virginia's share in said recognizance. As to what occurred at that interview between the complainant and Truitt and wife there is a direct and positive conflict in the testimony. Daniel Burton, a son of the complainant, who was examined on the part of the complainant, testifies that he was present at the said interview between complainant and Truitt and wife, that the complainant went over the account with Truitt and wife, explaining each item; that Truitt's wife pronounced the account to be correct and said it should be paid, except as to the last item of \$51.06, she said that she did not dispute it but that she would like to see the account, which the complainant promised to show to her and convince her that it was correct or strike it out; that Dr. Truitt and his wife then both of them said that the account was correct and should be paid; that the complainant then said to Dr. Truitt and his wife: "I am owing to Virginia a share in a certain recognizance which I entered into in the Orphans' Court of Kent County when I accepted part of the lands of my mother and her grandmother; this share is due to Virginia individually and cannot come into her father, David Burton's estate. The account I have just handed you is against Virginia individually, and I would like this account to be applied in payment of that recognizance." Dr. Truitt replied: "Mr. Burton, I am willing that this account should be applied in that way." The complainant then said: "Doctor, will you go to Dover and enter that recognizance satisfied on the record?" Dr. Truitt answered: "Mr. Cullen is my counsel and I will go to Georgetown next Tuesday and instruct him to allow this account in payment of the recognizance, and to satisfy the recognizance on the record." "Just as we were leav-

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ing Dr. Truitt and wife, at the close of this interview, Dr. Truitt handed the account back to the complainant, and requested him to hand it to Mr. Cullen, so that he might know the amount, and to tell him he would come up to see him on the next Tuesday, and instruct him to allow the account in payment of the recognizance, and to satisfy it on our record."

On the other side Mrs. Sophia Jane Burton, wife of John P. Burton, and the maternal aunt of said Virginia, who was examined on the part of the defendant, testifies as follows in regard to said interview :

"I was not present immediately, in the room at the time of the interview between Benjamin Burton and the said George T. Truitt and wife. The interview was had at my house in Washington in this county, some time in the fall of the year 1870. During said interview I was standing at the door leading from the room in which said interview was had, which door was partly open. I was near enough to the parties to hear all that was said, and see what was done. Benjamin Burton there and then produced a paper which he said was an account he had against Virginia, the wife of said George T. Truitt. He read the account over to George T. Truitt and wife, and asked them if it was correct. Truitt told him that he did not know anything about it, whether it was correct or not. Virginia objected to some parts of the account. He, Burton, asked them several times to agree to allow said account to cancel a recognizance due the said Virginia. The said George T. Truitt and Virginia, his wife, both refused to so allow said account, and referred him (Burton) to Charles M. Cullen, Esq., saying to Burton that the matter had been put in the hands of Mr. Cullen, and that any arrangement he could make with Mr. Cullen would be satisfactory to them, or they would agree to."

If these two were the only witnesses on this point, I

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should be inclined to think the preponderance of the testimony to be in favor of the complainant, as Daniel Burton, the complainant's witness, was in the room during the whole interview and more likely to be correct than Mrs. Sophia J. Burton, who was not actually present in the room. C. M. Cullen, Esq., however, in his testimony on the part of the defendant, says, among other things: "Mr. Burton then said to me that he had proposed to Dr. Truitt to allow his account as a set-off against his recognizance in the Orphans' Court, and that Dr. Truitt had refused to make any arrangement, or give his consent thereto, as the matter was in this deponent's hands, as his attorney, and he would be satisfied with any arrangement I might make in the settlement of the business." We thus have Mrs. Sophia Jane Burton directly corroborated in her testimony, and almost in her very words, by the declarations of the complainant to Mr. Cullen, and I cannot, therefore, consider it proved by the testimony that Truitt and his wife, or either of them, ever consented or agreed to allow the account of the complainant as a payment or set-off of the said Virginia's share of said recognizance. But it was suggested in the argument that the interview of which Mrs. Sophia Jane Burton speaks was at a different time from the one referred to by Daniel Burton in his testimony. Of this there is not the slightest evidence and there is nothing in the testimony of any of the witnesses to warrant the assumption of two interviews at the house of John P. Burton in the fall of 1870; but independently of the conflict in the testimony of the witnesses there is a ground on which, I think, such assent or promise on the part of Truitt and his wife would not in this court be regarded as binding upon either of them. Certainly no promise or agreement on the part of Truitt and wife to allow the claim of the complainant as a set-off or payment of her share in said recognizance would

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be operative and binding upon them, unless made with full knowledge of all the circumstances of the case. The complainant had been the executor of David Burton for more than fifteen years; during that time he had voluntarily taken upon himself to act the part of a parent or guardian towards the said Virginia, and yet with a full knowledge on his part of the condition of the estate of the deceased, and that Virginia would get nothing from her father's estate, neither real nor personal, he at said interview failed to disclose this fact to either Truitt or his wife. They had reason to suppose at that time that Virginia would be entitled under her father's will to more than two thousand dollars out of the personalty and to real estate worth about three thousand dollars, and yet the complainant, with knowledge on his part, suffered them to continue in ignorance of the true condition of David Burton's estate. There was on the part of the complainant a *suppressio veri* which would, I think, render any promise or agreement on the part of Truitt and his wife at the time of said interview nugatory and inoperative in a court of equity. See *Leading Cases in Equity*, Vol. 1, page 220, and cases there cited in the notes.

That the assignee of a chose in action takes it subject to all the equities which the debtor had against it at the time of the assignment, is a principle of law so well established as to require no citation of authorities. But to determine what constitutes an equity subject to which the assignee takes it is not always so clear and often presents embarrassing questions to the court, the solution of which must depend upon the facts of each particular case. In the case of *Greene v. Darling*, 5 Mason, 201, Judge Story in a very elaborate and well-considered opinion in commenting upon the doctrine of equitable set-off at page 214 uses the following language: "Where a chose in action is assigned, it may be admitted that the assignee

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takes it subject to all the equities existing between the original parties, as to that very chose in action, so assigned. But that is very different from admitting that he takes subject to all equities subsisting between the parties as to other debts or transactions. There is a wide distinction between the cases. An assignment of a chose in action conveys merely the rights which the assignor then possesses to that thing. But such an assignment does not necessarily draw after it all other equities of an independent nature. Then, again, what is the right of set-off? By our law it is not a compensation balancing debts *pro tanto*, as in the civil law, but mere matter of defense. The party is not bound to make use of it. He has his election; and if he does not assert it, his debt is not extinguished. It is a personal privilege, and not an incident or accompaniment of the debt. If a person assign a debt, he does not thereby assign any equity he may have to set it off against the debtor. Set-offs can only be between the parties to the record, or those for whose benefit the suit is brought. An assignee of a debt may set it off against a debt due by himself to the plaintiff; but certainly not against a debt due from the assignor to the plaintiff; nor could the assignor himself, after such assignment, set it off against the plaintiff. The right of set-off, in short, does not depend upon the mutuality of debts in their origin, as an inherent quality attaching itself to such debts, but upon the situation and rights of the parties, between whom it is sought to be enforced; and whether the suit be at law or in equity, there must be personal debts existing between them, and not merely between either of them, and third persons. As has been very properly remarked at the bar, it is a privilege or right attaching to the remedy only; which in some States may be allowed by their laws and in others denied. But it touches not any obligation of con-

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tract or vested right. But it is said that the right of set-off is an equity, which at all events the original debtor may assert against the assignor, and also against his assignee of the debt, whether he has, or has not, notice of its existence. If by an equity is meant a mere dictate of natural justice in a general sense, it is not worth while to discuss it, because this court is not called upon to administer a system of mere universal principles. If by an equity is meant a right which a court of equity ought to enforce, it remains to be proved that such an equity exists in the jurisprudence which this court is called upon to administer. The English Court of Chancery has as yet laid down no such general rule. Where there are mutual debts subsisting, and there is either an implied or express agreement of stoppage *pro tanto*, or mutual credit, doubtless a court of equity would enforce it against the party himself and against his assignee with notice; that it would enforce it against his assignee without notice is not so clear; and to say the least of it, would trench upon some of its known doctrines for the protection of bona fide purchasers. There are some American cases, in which a doctrine approaching to this extent has been entertained by courts of law; but, upon examination, they will be found to rest either upon the construction of local statutes or upon local jurisprudence." The learned judge in the same case after reviewing the decisions of the English Court of Chancery says at page 212: "The conclusion which seems deducible from the general current of the English decisions (though most of them have arisen in bankruptcy), is that courts of equity will set off distinct debts, where there has been a mutual credit, upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent."

In Story's Equity Jurisprudence, 12th edition, vol. 2,

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pages 683, 684, section 1435, the author says: "In the first place it would seem that, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time upon the existence of some debt due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party and a credit by the other party founded on and trusting to such debt, as a means of discharging it."

It can, I think, hardly be pretended that the complainant in the present case is entitled to the relief he seeks on the ground of mutual debts and credit, for it is evident that neither Truitt nor his wife knew anything of the indebtedness of the complainant to the said Virginia on the said recognizance until they were informed thereof by the complainant himself at the interview at the house of John P. Burton in November, 1870. At that time they thought the complainant, as the executor of David Burton, was indebted to the said Virginia for money due her under the will of her father, and Virginia supposed that the advances made by the complainant for her use and benefit during her minority were made out of moneys coming from her father's estate, but they did not know of the existence of said recognizance until informed thereof by the complainant at said interview.

There can be no doubt that courts of equity will interpose to allow set-off, and claims in the nature of set-off, in all cases where there are peculiar equities between the parties calling for the interposition of the court, and the question presents itself whether the complainant in this suit has such a peculiar equity as to call for the interpo-

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sition of a court of equity to allow his claim as a set-off and to arrest the suit at law brought by Willen to recover the share of the recognizance assigned to him by Truitt. Here was a child left an orphan at the tender age of six years, and although entitled, as heir-at-law of her grandmother, Polly Vessels, to a share in four recognizances in the Orphans' Court for Sussex County, her share amounting in the aggregate, exclusive of interest, to ten hundred and eighty dollars and forty-six cents, and although entitled to all the real and personal property left by her father, after the payment of his debts, yet never had a guardian appointed for her during the whole time of her minority.

The complainant was the executor of the last will of the father of this child, who at the time of his death left a considerable real and personal property worth some five or six thousand dollars, and at the expiration of about five years after the death of the said deceased, the complainant, as executor, passed before the Register of Wills for Sussex County a second testamentary account on the estate of the deceased, showing an unappropriated balance in his hands of two thousand three hundred and thirty-five dollars and fifty-one cents, and passed no other account on said estate until nearly fourteen years thereafter, being long after the said child had attained her majority and long after the commencement of this suit, although frequently called upon to do so by the Register of Wills. The complainant, from the time of the death of the said David Burton until the first of January, 1870, a period of nearly fifteen years, received all the rents of the real estate left by him at the time of his decease. The complainant at the time he passed his second testamentary account, as executor of David Burton, must have known the true condition of the estate. Five years had then elapsed, and within that time he must have ascer-

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tained all the debts due from the testator, and all the debts due to him, and whether collectible or not, at least it was his duty to have done so, and if he had not within that time informed himself of the condition of the estate, he was negligent in the performance of the trust he had assumed. It will not do to say that by keeping the estate open and unsettled and continuing in the receipt of the rents of the real property for fifteen years he was benefiting the said Virginia, for it is evident that while the debts due from the decedent were unpaid, the interest of them was accumulating, and that the real estate for want of repairs and proper attention was becoming each year less valuable. Beside, this delay in the settlement of the estate of David Burton caused the said Virginia to be kept in ignorance of its true condition, and very naturally created in her mind the belief that she was entitled to considerable property from her deceased father, and may have caused her to be more extravagant in her expenses than she would have been had she known that her father's estate was insolvent and she would get nothing from him. The complainant was the nearest male relative, or at least one of the nearest male relatives, of the said Virginia after her father's death. He had been a partner with her father in the tannery business at the time of his death, and he was entrusted with the settlement of his estate. He had a plain and simple duty to perform towards this child who was left an orphan at such a tender age; that duty was to see that this child should have a legally appointed guardian to watch over and protect her interests. Instead of pursuing the plain, simple course marked out by the law he chose voluntarily to assume the duties of guardian without being legally invested with the powers and functions thereof, and without bond or security for the faithful performance of his trust, and with no liability on him to render an ac-

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count of his trusteeship to any officer of the law. Voluntarily assuming such a relationship outside of the law and possessed with full knowledge on his part of the circumstances and financial condition of the said Virginia, he of his own motion chose to expend upon her during her minority a sum of money, not only largely in excess of her income but nearly sufficient to exhaust and consume her whole capital. That he was actuated by pure motives of love and affection towards his orphan niece is doubtless true, and it is also true that his niece is morally if not legally bound to reimburse him for his expenses upon her. But this court, as has often been remarked, cannot undertake to administer a general system of morals. If the complainant had been appointed the guardian of the said minor in due form of law, he would have had no right to exceed her income without an order of the Orphans' Court allowing him to do so. If without such an order he had voluntarily exceeded her income, and had afterwards, as her guardian, applied to the Orphans' Court for an order to exceed her income for the sole purpose of reimbursing himself, the court would have hesitated in granting such an order and would probably have refused the application.

That the Orphans' Court will generally make an order to exceed a minor's income upon the application of the guardian in a proper case, such as for board, clothing, and education, is true; but in doing so the practice of the court is to specify in the order the amount of the capital so to be expended, and such orders are generally for expenses to be incurred and not to repay the guardian for advances which have been made by him in excess of the income. In *Leading Cases in Equity*, Vol. 3, page 267, it is laid down in a note: "Under ordinary circumstances the court will, however, require the guardian or trustee to apply for direction before making an outlay of the

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infant's principal for any purpose and will look with disfavor on an attempt to obtain a subsequent ratification of that which ought not to have been done without a previous authority." *McDowell v. Caldwell*, 2 McCord, Eq. 43, 16 Am. Dec. 635; *Davis v. Roberts*, 1 Smedes & M. Ch. 543; *Myers v. Wade*, 6 Rand. (Va.) 444; *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184.

Notwithstanding the disfavor with which courts of equity regard all incroachments by the guardian upon the capital of the ward without the previous consent of the court, yet this court is now asked to allow the complainant to exhaust nearly the whole of the capital of the said Virginia so as to reimburse him for expenses incurred in behalf of the minor upon his own voluntary motion, and without ever having been appointed her guardian, and this, too, against the rights of a bona fide assignee for valuable consideration, though perhaps with notice of the complainant's claim. It will be well to pause and consider the consequences of such a doctrine before giving it the sanction of a court of equity. Such a doctrine would be fraught with most dangerous consequences to minors who are under the especial care and protection of courts of equity. It would do away with all appointments of guardians; it would be a virtual repeal of our statutes, prescribing the rights, powers, and duties of guardians, and it would break down, and destroy, all those safeguards which our law has so wisely thrown around infants, for the protection of their estates. Any one who might be indebted to a minor could, whenever he chose so to do, make advances for articles which he or the minor might think necessary and suitable, to an amount equal to his indebtedness, and thus without law, and without the sanction of any court, exhaust the capital of the minor. The affirmance of such a doctrine would, as was said in the argument at bar, be a premium for lawlessness.

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It would doubtless be a hardship on the complainant for him to be compelled to pay Virginia's share of said recognizance, and to lose the money he had advanced for the use and benefit of the said Virginia during her minority. But it would be a hardship which he had voluntarily brought upon himself by his own acts and conduct. He was fully acquainted with her financial circumstances during her minority. He could have been appointed her guardian, and if her income were not sufficient for her support, maintenance, and education, he could have applied to the Orphans' Court for an order to exceed income, which in a proper case would have been granted by the court. Such a course would have been in consonance with the laws of our State, and would have protected him in any advance he might have made for the benefit of his ward if within the order of the court. He chose not to pursue the plan which the law directed, but he preferred to take the matter in his own hands, and to act as her guardian without the sanction of law. Besides, he knew that the said Virginia might marry before she became of age, and that by the law, as it then stood, her personal property would become her husband's and that any chose in action, possessed by her, might be reduced into possession and become his. He ran these risks when he might have protected himself, and if thereby he becomes a loser, he has no one to blame but himself. If the view just presented be correct, this case might rest here, but it may be well to notice briefly the account of the complainant, which he asks this court to allow him to set off against Virginia's share of said recognizance, assigned by her husband to Willen. That an infant may lawfully contract for necessaries suitable to his circumstances and station in life, is a familiar principle of law. It is an exception to the general rule, that infants cannot make contracts which are binding upon them; and it is

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an exception which has been made by the common law solely for the benefit of the infant. This account of the complainant, however, is not for necessities furnished by the complainant himself to the said minor.

Every item of the account is either for money paid by the complainant to other parties for board, clothing, and tuition, furnished and supplied by them to the said Virginia, or for money advanced by the complainant directly to the said Virginia for her to purchase clothing or for her traveling expenses. It may be true that the board, clothing, and tuition of the said Virginia so paid for by the complainant, were necessary for her, and perhaps suited to her circumstances and station, but the court is left without any satisfactory evidence on this point. It is true that the complainant presents receipts for most of the money expended by him for the said Virginia, and that these receipts are proved. It is also true that the articles and matters for which the complainant paid come within the class of necessities for which an infant may lawfully contract, but whether the specific articles furnished, for which the complainant paid, and for which the receipts were given, were necessities suitable for the said minor, is not sufficiently clear from the evidence. "In suits at law for necessities the question whether the articles are of those classes for which an infant is bound to pay, is one of law for the court. The question whether they were actually necessary and suitable to the condition of the infant is one of fact for the jury." 1 Parsons, Cont. p. 296; *Beeler v. Young*, 1 Bibb, 519; *Glover v. Ott*, 1 McCord, L. 572; *Bent v. Manning*, 10 Vt. 225; *Grace v. Hale*, 2 Humph. 27, 36 Am. Dec. 296.

It was urged in the argument that the said Virginia after she became of age admitted the account to be correct, but on this point there is some conflict in the testimony, and it is certain even by the testimony of Daniel

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Burton, the strongest witness for the complainant on this point, that she did not admit the correctness of the last item in the account, of fifty-one dollars and six cents, stated in the account to have been kept by complainant's wife. This account extended through a period of fifteen years, and commenced when Virginia was not quite six years old. It was impossible for her to have remembered all the articles furnished to her during that entire period, and to have known whether the articles so furnished were necessary and suitable to her condition, and whether the account in the whole was correct or not.

Again, several items in the account are for moneys advanced directly by the complainant to the said Virginia during her minority. While it is true, as before observed, that an infant may lawfully contract for necessities suitable to his estate and station, it is equally true that an infant cannot borrow money so as to render himself liable to an action for money lent, although borrowed and expended for necessities, because the law does not for his own sake trust him with the expenditure. 1 Parsons, Contracts, pp. 297, 298; *Smith v. Gibson*, Peake, Add. Cas. 52; *Darby v. Boucher*, 1 Salk. 279.

Again, the largest item in this account is that of March 1, 1864, paid John P. Burton, \$515. The voucher for this item shows it to be for board and washing for the said Virginia from August 1, 1855, to March 1, 1864, eight years and seven months. The said John P. Burton was the husband of the maternal aunt of the said Virginia, with whom she lived from the time of her father's death until her marriage to George T. Truitt. It is a familiar principle, announced by several reported decisions in our State, that the law will not imply a contract to pay for board and support between near relatives, and it is also to be noted that this bill of John P. Burton, which the complainant paid, extended through

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a period of eight years and seven months. My purpose in alluding to these matters appearing on the face of the account is not to express any opinion as to the liability of George T. Truitt and his wife to the complainant on this account in a court of law, but to show that there are questions of law arising on the account itself which may materially affect the rights of the parties, and that the rights of the complainant and the liability of Truitt and his wife on this account should be first ascertained and established in a court of law before the complainant is entitled to call upon this court to set off this open and unascertained account against a clear, fixed, and ascertained indebtedness due from him on said recognizance. As a rule the Court of Chancery will not set off unliquidated and unascertained accounts. *Foot v. Ketchum*, 15 Vt. 258, 40. Am. Dec. 678.

It appears among the exhibits filed in this cause that on the 21st of August, 1873, Benjamin Burton, the complainant, commenced in the Superior Court for Sussex County by foreign attachment a suit against George T. Truitt and Virginia C., his wife, to recover judgment against them for the moneys advanced by him for the use and benefit of the said Virginia during her minority. On this suit of foreign attachment, the lands devised by David Burton to his daughter Virginia, and then owned by her, were attached. Subsequently special bail was entered by the defendants, and the attachment dissolved, after which plaintiff's narr. was filed, and the cause pleaded to issue, but nothing further seems to have been done in that suit, and it still sleeps quietly on the records of the Superior Court.

It only remains briefly to notice one or two other points presented by the solicitor for the complainant in the argument at bar. It was suggested by him that if the assignment by Truitt to Willen had been made with

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a fraudulent intent on the part of Willen to prevent the complainant from collecting his debt against Truitt's wife, the assignment would not avail in equity. This, as a principle of equity jurisprudence, is true; but the proposition lacks evidence to support it. There is no proof whatever in the cause of any fraud, actual or implied, on the part of Willen. Willen was a bona fide purchaser for a valuable consideration though perhaps with notice, at the time of the assignment to him of some claim on the part of the complainant against the said Virginia. Fraud is never presumed, but must always be proved like any other fact in a cause.

Another ground assumed by the complainant's solicitor as a reason why the court should allow the complainant's claim as a set-off in this case was the alleged insolvency of Truitt. Courts of equity will sometimes allow a set-off on account of insolvency, when otherwise they would not interfere. In our own State the Superior Court in the exercise of its equity powers will sometimes allow judgments to be set off against each other in cases of insolvency and even after an assignment, when made for the purpose of defeating the rights of set-off (*Morris v. Hollis*, 2 Harr. (Del.) 4); but in the present case there is no evidence that Truitt was or is insolvent. It is true that Willen in his answer states that Truitt about the time of his assignment was under execution by one of his creditors, and was threatened with suits by some others of his creditors. It does not follow, however, that because a man may be under execution process, and threatened with suits by some of his creditors, he is therefore insolvent. Indeed it appears from the evidence that out of the consideration money which Willen was to pay Truitt for the assignment of Truitt's wife's share in the four recognizances, after the payment of all his indebtedness there remained to Truitt about eight hundred and fifty-three dollars, which amount was secured to him by

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the two judgment notes of Willen, and which were afterwards paid by Willen to him. Insolvency, when relied on by a complainant as a ground for relief, must be proved by him, like any other fact; and the only proof on this point in the present case shows Truitt to be solvent. Residence out of the State was also another ground, suggested by the complainant's solicitor for granting the relief asked for in the complainant's bill. The answer to this is, that Truitt and his wife were both residents of Sussex County before and at the time of the assignment, and continued such residents until after the commencement of this chancery suit.

In considering this case, I have not thought it necessary to express any opinion as to the admissibility of the testimony of George T. Truitt and his wife, taken by Willen before they were made parties defendants, and to which the complainant, through his solicitor, excepted; nor to decide whether or not the answer of Truitt and his wife was to have the effect of an answer under oath, called for by the complainant's bill, in regard to which there was a difference of opinion between the solicitors of the respective parties. In arriving at my conclusions, I have disregarded entirely the testimony of Truitt and his wife, and I have not given to the answer of Truitt and his wife the effect of an answer under oath, called for by the complainant's bill. I have, therefore given to the complainant the benefit of his exceptions on both these points, without, however, expressing any opinion in regard to them.

Upon a careful consideration of this whole case, I am of opinion that the complainant has failed to establish any equity, entitling him to the relief sought for in his bill. I, therefore, think that the injunction heretofore issued in this cause should be dissolved, and the bill dismissed with costs.

Let the decree be entered accordingly.

APPENDIX C.

I.

CHANCELLOR WILLARD SAULSBURY.

HON. WILLARD SAULSBURY, Chancellor of the State of Delaware, died at his home in Dover on April 6, 1892. His sudden death, the cause of which was apoplexy, was a great shock to the people of that State, in the affairs of which for nearly fifty years he had been prominent.

He was born in Misspillion Hundred, in the southwestern part of Kent County, Delaware, near the Maryland State Line, on June 2, 1820. William Saulsbury, his father, was a man of strong character, sterling worth, and commanding influence in the community where he lived. His mother, Margaret Saulsbury, was a daughter of Captain Thomas Smith. She was a most exemplary woman and possessed great mental power, a marked characteristic of her distinguished son, two of whose brothers, the late Dr. Gove Saulsbury, Governor of Delaware, and Hon. Eli Saulsbury, a senator in Congress of the United States from 1871 to 1889, also attained national reputation.

The Saulsbury family is of Welsh descent, having come to this country in the seventeenth century, since which time they have held lands in Dorchester County, Maryland, a part of which, including the farm upon which Willard Saulsbury was born, and which has been held by the family since the settlement of the county, was, on the adjustment of lines between the States, awarded to Delaware. Though land-owners in Maryland and Delaware for about two centuries, and though some of them held offices of local honor and importance in both States, no member of the family seems to have attained

more than local distinction until Willard Saulsbury, the youngest of the three brothers, Gove, Eli and Willard, began to win the hearts of the people to him, and to achieve those successes, professional and political, which made him in his State second to none of her gifted sons whom she has delighted to honor.

Willard Saulsbury about the age of thirteen was sent to school at an Academy at Denton, Md., near his home. After completing his academic education at Delaware College and Dickinson College, he began the study of the law with Hon. James L. Bartol of Denton, afterward Chief-Justice of Maryland. He completed his legal course under the direction of Hon. Martin W. Bates, afterward United States Senator, at Dover, where he was admitted to the bar in 1845.

He had seriously considered at one time the advisability of "going west;" but a remark of his mother, who wished to keep him near her, that she "would be ashamed of any son who could not make his living in his native State," drove such thoughts from his mind.

He was a hard student, but intensely fond of mixing with the people, and during his law course, with characteristic industry and energy, he taught school in Dover, thus doubtless gaining, like so many other men of mark, a practical knowledge of the character of others, and a coolness of judgment and capacity for self-control that were of great use to him in after life.

Immediately after his admission to the bar, he removed to Georgetown in Sussex County, opened an office, and began the practice of his chosen profession. His genial nature and popular manners soon won him hosts of friends; and his legal knowledge and persuasive eloquence, coupled with strict integrity and attention to business, soon brought him scores of clients. His success was assured from the start, and it was not long before he stood in the very front rank of his profession; thenceforth until his election to the Senate and his necessary

absence at Washington, scarcely a case of importance was tried in Sussex County in which he was not of counsel.

When twenty-nine years of age, in 1850, Governor Tharp appointed him Attorney-General.

As Attorney-General he was equal to every demand; and not only justified the confidence of his friends, but won the esteem and respect of his opponents. During this official term some of the most important cases in the State were tried, and in all of them he maintained his high character for legal ability, strict integrity, and close attention to his official duties.

With juries his success was truly phenomenal. The cases in the two lower counties of Delaware, Kent and Sussex, which always excited the greatest public attention and seemed to be of the greatest public importance, were the trials of those charged with capital felonies; and these were not a few. None in Sussex and few in Kent were tried when Willard Saulsbury was in active practice and not acting as Attorney-General, where he did not represent the accused. Never but in a single case was his client convicted as charged in the indictment. Mr. Saulsbury once said that this was his only case when the Chief-Justice, who presided, and was an old prosecuting officer, was with him for acquittal.

The same success distinguished his administration of the office of Attorney-General as his private practice. He was a hard student and an omnivorous reader; added to his learning were those natural gifts which all tend to make a man succeed, and are necessary to the highest success.

His was a splendid personality, — a man six feet in height, perfectly proportioned, hair of raven blackness, eyes tender and impassioned or stern and flashing, laughing with infecting pleasure or veiled in tears as the theme of his eloquence demanded, and within him as kind and true a heart as ever beat, forbidding him to wrong the humblest of God's creatures.

The following graceful tribute was published at the time of his death by a Sussex countian :

" Delaware has always been proud of her public men, and it would be difficult to name one who has justified and called forth that pride more than the man to whom the last of earth's honors will be paid this afternoon at Dover. Attorney-General, Senator, Chancellor, — how she loved to shower her gifts upon him, and how well did he repay her for all she gave him ! At the bar, in the Senate, on the bench, it was the same, — new lustre added to the brightness of the fame of this little State. Delaware was proud of him, but here in Sussex it was something more than pride. To the younger generation the hold that Willard Saulsbury had upon the hearts of the men of Sussex during the time of his active public career is something incomprehensible. It was a personal loyalty that is absolutely non-existent at the present day. There are gray-haired men in Sussex whose voices quiver and whose eyes glisten with the enthusiasm of boyhood as they talk to you of Willard Saulsbury. It was here that he entered upon his profession, and it was here that his earliest triumphs were achieved. And he never forgot old Sussex. To the day of his death his thoughts turned kindly to the honest, faithful hearts that had never failed him. And so at Dover among the throng that gathered there to pay the last sad tribute to the dead Chancellor, there were no sincerer mourners than the old men of Sussex who honored and loved him in his life, and who will tenderly cherish his memory."

For twelve years, from 1859 to 1871, he represented his native State in the National Senate, and there maintained his great reputation for learning, eloquence, and statesmanship which he had acquired at home. Though overborne by the weight of numbers of the opposition ; though during those times of the greatest excitement this country has ever witnessed he was often threatened with personal violence for the absolute fearlessness with which

he opposed many of the popular measures of the war,—he never hesitated to combat those radical measures which he believed subversive of the Federal Constitution. His bold and eloquent speech against the suspension of the Habeas Corpus was delivered against the protests of his friends, who believed his life would be imperilled thereby, and against the earnest objections of his colleague. The slightest element of personal fear was unknown to him. Though always a staunch supporter of the Union, his political opinions as to methods were opposed to those in power at that time.

One of his important writings was an open letter to the people of his State, published about the time of the beginning of the war, in which he declared that Delaware, the first State to ratify the Constitution, should be the last to do aught to cause the dissolution of the Union; but if, alas, the Union should be destroyed and the federal compact broken, he declared his firm conviction to be that she should never again enter into a compact to which either South Carolina or New England should be parties unless the whole Union should again be indissolubly restored. When files of soldiers were stationed at each polling-place in his native State, he was as courageously outspoken as in time of peace. In the greatest forum of the time he proved himself in statesmanship, learning, eloquence, and courage the peer of any who dared combat him.

Being one of a helpless and almost hopeless minority in the Senate, he directed his efforts chiefly to ameliorating the hard conditions imposed upon the States and people in rebellion, and during the stormy times of war and reconstruction, he held fast to his firm belief in the efficacy and sanctity of our Federal Constitution, and never hesitated to raise his voice in defense of his convictions, in favor of what he thought to be the right, and against all unconstitutional usurpations of overwhelming force and power.

In 1871 he practically retired from political life, and after a brief period of the practice of his profession, during which he showed his old-time fire and energy and won one of the most important cases of his life, he was made Chancellor.

Surrounded by his books, his life was thenceforth spent in peace and quiet in greatest contrast to the stormy scenes of his political career.

For more than eighteen years in the highest judicial position of his State he held the scales of justice with an even hand. As Chancellor of Delaware, some of the most important questions ever raised in the State came before him; and in the adjudication and determination of all questions presented to him he took a strong and comprehensive grasp of the facts and the legal principles applicable thereto, and allowed no artificial technicalities, "the husk about the kernel of the cause," to hinder or confuse the right determination of a case; and though infirm in body, his bright intellect remained undimmed until his death.

II.

RESOLUTIONS OF THE BAR OF SUSSEX COUNTY, ON THE DEATH OF CHANCELLOR SAULSBURY.

At a meeting of the Members of the Bar of Sussex County held on Thursday, April 7, 1892, on the report of a committee composed of Hon. Alfred P. Robinson, Charles F. Richards, Esq., and Robert C. White, Esq., the following Resolutions were unanimously adopted:

"The intelligence of the sudden death of the Hon. Willard Saulsbury, Chancellor of the State of Delaware, is received by the Bar of Sussex County with profound sorrow. Born in the County of Kent, he came to Sussex almost immediately upon his admission to the Bar. His mental, moral, and social qualities obtained immediate recognition by our people and he early gained pre-eminence at the Bar and ascendancy in politics. Appointed

Attorney-General of the State in a few years after he began the practice of law, he immediately became one of the leaders of the Bar of the State. His personal magnetism and great intellectual ability gave him such influence in his political party that at the early age of thirty-nine years he was elected a member of the United States Senate, and soon became an acknowledged leader in that body. Upon his appointment to the Bench he at once manifested the same great ability as a jurist that had given him his pre-eminence as a lawyer and a statesman. Therefore, at a meeting of the Bar of Sussex County, called to take proper and appropriate action relative to the death of Chancellor Saulsbury ; be it,

“Resolved, That in his death the Bench and Bar of the State of Delaware have met with an irreparable loss and the people of the State sustained the loss of a most efficient and conscientious jurist.

“Resolved, That the Bar of Sussex County feel the greatest pride in the successful career of the deceased, both as a member of their body and as a jurist, selected from their number, and that they believe that the opinions delivered by him while Chancellor of the State will rank in learning and ability with those of the most eminent jurists who have occupied the position in this and our mother country.

“Resolved, That we desire to express our recognition of the urbanity and courtesy with which we were uniformly treated by the deceased in all our official and private relations with him.

“Resolved, That we tender to his bereaved family our sincere sympathy in this the hour of their affliction and that the members of this Bar attend his funeral in a body, from his late residence in Dover on Saturday the 9th instant.

“Resolved, That the secretary of this meeting be directed to transmit a copy of these resolutions to the family of the deceased, and have these proceedings published in

two of the weekly newspapers of this county and in one of the daily newspapers of Wilmington.

Resolved, That A. P. Robinson be directed to present these resolutions to the Court of Chancery, Orphans' Court and the Superior Court in and for Sussex County at the next ensuing term thereof."

III.

RESOLUTIONS ADOPTED BY THE BAR OF KENT COUNTY, WEDNESDAY EVENING, APRIL 6TH, 1892.

Resolved, That in the decease of Chancellor Saulsbury the State has sustained the loss of an eniment citizen whose life was devoted to the public service, and who in every position which he occupied was found equal to the discharge of the duties devolved upon him.

Resolved, That while in common with the general citizenship, we lament his death, yet as members of the Bar, we held with him a more intimate relation and are capable to speak more discriminatingly of his ability as a lawyer and a judge.

Resolved, That in his judicial career he maintained the high standard of excellence which has always characterized the Bench of this State, and especially by his researches in the domain of equity jurisprudence, fitly supplemented the labors of his distinguished predecessors.

Resolved, That the secretary communicate to his family a copy of these resolutions, with the assurance of our sympathy.

Resolved, That the chairman of this meeting be directed to present a copy of these resolutions to the superior court and to the Court of Chancery of this county and to the Court of Errors and Appeals of this State at their next session, with a request that they be entered upon their respective records. -

N. B. SMITHERS, Chairman.

ROBERT H. VAN DYKE, Secretary.

IV.

RESOLUTIONS ADOPTED BY THE BAR OF NEW CASTLE COUNTY,

Thursday, April 7th, 1892, on the Report of a Committee
Composed of Benjamin Nields, Esq., Hon. Thomas
F. Bayard, William C. Spruance, Esq.,
Hon. Charles B. Lore, and John
A. Rodney, Esq.,

Resolved, That the death of Chancellor Sausbury has caused profound sorrow to fall upon the members of this Bar and the people throughout the State.

Resolved, That in the sudden death of this eminent statesman and jurist, the court, the profession of the law, and the community at large, have suffered a great loss.

Resolved, That in the discharge of his public duties, as Attorney-General of the State of Delaware, as United States Senator, and as Chancellor of this State, his learning, legal ability, broad views, purity of purpose and character, placed him among the foremost men of our State and Nation.

Resolved, That the members of this Bar hold in grateful esteem his uniform kindness and patience and bear witness to his firmness of purpose and constant adherence to the right in his administration of justice.

Resolved, That a copy of these resolutions be presented to the family of Chancellor Sausbury with the sincere sympathy of this Bar in their bereavement.

Resolved, That a committee of two be appointed by the chairman to present copies of these resolutions to the Court of Chancery and the Superior Court of this State, at the ensuing terms thereof.

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2. It seems that the settlement of a collector's accounts by the Levy Court and the making of allowances for delinquents as provided by Delaware Laws, chap. 8, § 21, will not prevent the holding of the collector and his sureties liable for money received and not accounted for by the collector. *Mealey v. Buckingham*, 356.

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1. A suit to enjoin proceedings to collect from a surety on a collector's bond an amount collected, but not accounted for by his principal, on the ground that the matter was concluded by the settlement of the collector's accounts, is premature if no execution has been issued or other steps taken to collect the judgment, although the judgment has been entered. *Mealey v. Buckingham*, 356.

2. A citizen and taxpayer of a county cannot maintain a suit on behalf of himself and all other taxpayers of the county to enjoin the striking of names from the tax list, on the ground that his taxes will be thereby increased. *Biggs v. Buckingham*, 267.

3. A county clerk of the peace who is under heavy penalties charged with the duty of placing upon the collectors' duplicates the names of taxables as returned by the assessors has such a special interest in the preservation of the list as to be entitled to maintain an injunction suit to prevent them from being mutilated. *Ibid.*

4. A county clerk of the peace and *ex officio* clerk of the Levy Court may maintain a suit to enjoin such court from striking names from the tax list so as to make it morally and legally unjust for him to join in a certification of the mutilated list, and to render him liable to heavy pecuniary penalties for furnishing and certifying duplicates thereof to the county officers for collection. *Ibid.*

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EXECUTION.

1. An execution is necessary on a judgment settling collector's accounts, in order to sustain injunction against proceedings to collect from surety. *Mealey v. Buckingham*, 856.

2. S, a judgment creditor of B as principal and H as surety, issued an execution against B, and levied on goods of sufficient value to satisfy the judgment, but afterwards stayed the same, and permitted B to sell the goods levied on and apply the proceeds to his own use without the consent of H, the surety. *Held*, that the judgment as to H was satisfied in equity, and that S should be perpetually enjoined from proceeding against H, the surety. *Hazel v. Sinax*, 19.

EXECUTORS AND ADMINISTRATORS.

1. An administrator is held not to be a right heir. *Mason v. Bailly*, 129.

EXECUTORS AND ADMINISTRATORS—Continued.

2. The right of an administrator to take a legacy by right of representation is sustained. *Rubencane v. McKee*, 40.

3. The promise of a person to allow advances made by executor,—held not binding. *Burton v. Willen* (Appx.) 408.

4. The personal property designated by the will for the payment of debts and expenses, and that not specially devised, being insufficient for the purpose, the administrator *cum testamento annexo* is ordered to sell so much of certain bank stock devised in trust for testator's children as may be necessary for payment of debts and expenses. *Hoffecker v. Clark*, 125.

5. The Orphans' Court in Delaware may determine the amount and the manner of investment of a sum to be invested to raise an annuity for a widow who relinquished her dower right to permit a sale for the benefit of creditors, under the mistaken impression that the estate was solvent. *Green v. Saulsbury* (Appx.) 871.

6. A sum sufficient to raise the annuity provided by the will may be ordered to be invested in favor of the widow as against creditors of the estate, where she relinquished her dower rights and elected to take under the will in reliance upon representations of the executors that the estate was solvent, without knowing or having the means of knowing that it was insolvent. *Ibid.*

7. The claims of creditors are not to be preferred to those of a widow who waives her assignment of dower by metes and bounds, and elects to take the devises contained in the will in her favor in lieu of her right at law, unless the provisions in her favor are so disproportionate to the value of her dower at law as would amount to a fraud upon creditors. *Ibid.*

8. A court having jurisdiction of the subject-matter of ordering a sale of a decedent's real estate to pay debts and of the proceedings thereunder, and possessing equity powers with respect to the matters within its jurisdiction, may protect the rights of a widow who has relinquished her dower rights to permit the sale, either by setting aside such relinquishment or by securing to her the benefit, as against creditors, of the provisions of the will in lieu of dower. *Ibid.*

9. Proceedings by petition and rule, as well as by bill and answer, may be had to set aside a widow's election to take under a will, or to secure to her the provisions of the will as against creditors. *Ibid.*

FRAUD.

For voluntary conveyance by intended wife as fraud on husband, see **HUSBAND AND WIFE**.

A claim of fraud in obtaining conveyance of mortgaged premises,—held not to be sustained. *Walker v. Farmers' Bank of the City of Delaware*, 81.

GARNISHMENT.

Judgments against garnishees of insolvent corporation,—held not subject to injunction at suit of receiver appointed in another state. *Stockbridge v. Beckwith*, 72.

GUARDIAN AND WARD.

1. A promise to allow advances made by an executor,—held not binding. *Burton v. Willen* (Appx.) 403.

2. A relative of an orphan who, without authority from the court, assumes the position of guardian for it, and not only exceeds its income but nearly exhausts its principal in paying current expenses, will not be aided by a court of equity to set off his liability upon a recognizance which he owes to it and which is in the hands of her assignee for value, upon advances which he has personally made in the payment of expenses. *Ibid.*

HEIRS.

For devise and bequest to, see **WILLS**.

HIGHWAYS.

For dedication of land for, see **DEDICATION**.

For proceedings of condemnation to take land for highways, see **EMINENT DOMAIN**.

HUSBAND AND WIFE.

1. A husband is held not to be a right heir of his wife. *Mason v. Baily*, 129.

2. The share of a woman as tenant in common in the proceeds of land the right to possession of which vested in her after the passage of the Married Woman's Acts, and which have been sold under direction of the court for partition, will be paid to her absolutely, and not invested for her husband's benefit. *Moore v. Darby*, 193.

3. A court of equity will protect a husband against a voluntary conveyance by his intended wife of all her estate, to the exclusion of the husband, made pending an engagement of marriage, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not. *Leary v. King*, 108.

INDEMNITY.

For duty of obligees in a bond for indemnity to account, see **CONTRIBUTION**.

INFANTS. See also **GUARDIAN AND WARD**.

1. A promise after majority to allow advances made by an executor,—held not binding. *Burton v. Willen* (Appx.) 403.

2. Before equity will decree the repayment of money advanced to pay for articles purchased by an infant, the one making the advances must show that the articles were necessities. *Ibid.*

INJUNCTION.

1. An injunction against executing a resolution of condemnation because of insufficient notice was granted. *Fulton v. Dover*, 1.

2. An injunction against collecting a usurious judgment is allowed. *Hazel v. Sinez*, 19.

3. An injunction against proceeding to enforce an execution against a surety is sustained also on the ground that the judgment was satisfied in equity. *Ibid.*

4. An injunction against an action at law on a recognizance, upon the ground of payment,—denied. *Burton v. Willen* (Appx.) 403.

5. An injunction against collecting from a surety on a collector's bond because of a settlement of accounts,—is held premature. *Mealey v. Buckingham*, 356.

6. A receiver appointed by the Circuit Court of the City of Baltimore, in the State of Maryland, is not entitled to an injunction of the court of chancery of this State, to restrain the collection of a judgment recovered at law in this State by creditors of an insolvent corporation, nor against persons who have recovered judgments against the garnishees of such insolvent corporation under process of foreign attachment. *Stockbridge v. Beckwith*, 72.

7. An injunction may be allowed at the suit of the county clerk, to prevent the mutilation of tax lists. *Biggs v. Buckingham*, 267.

8. So to prevent striking names from tax list. *Ibid.*

9. A citizen and tax payer is denied the right to maintain suit for an injunction to prevent striking names from tax list. *Ibid.*

10. An injunction may properly be issued to prevent the altering or obliterating of entries made upon an assessment and delinquent list on file in the clerk's office, at the request of a surety on the collector's bond, although his suit to enjoin the collection of a judgment against him for moneys collected, but unaccounted for by the collector, fails because prematurely commenced. *Mealey v. Buckingham*, 356.

11. Where the danger threatened is of such a nature that it cannot easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, an interlocutory injunction will be allowed, unless the equities of the bill are satisfactorily refuted. *Jessup & Moore Paper Co. v. Ford*, 52.

12. The authority of a court of equity to restrain the pollution of natural streams, where such pollution will cause irreparable injury and loss to a riparian owner in his accustomed and necessary legal use of the waters thereof, is unquestionable. *Ibid.*

INJUNCTION—*Continued.*

13. A preliminary injunction granted at the suit of a riparian owner operating paper-pulp works on a natural stream, the use of the water of which in an unpolluted condition was necessary to his business and to which he was entitled—to restrain the operation, by an upper riparian owner, of a morocco factory, the operation of which threatened to pollute the water of the stream and render it unfit for use by others, and so work serious injury to the complainant's business. *Ibid.*

14. A preliminary injunction restraining the use, when completed, of a building in course of erection, as a morocco factory, so as to pollute and render unfit for domestic and agricultural purposes the waters of a natural stream, to the use of which in its natural condition the owner of land through which it passed was entitled,—made perpetual by consent. *Forman v. Ford*, 47.

INSOLVENCY.

For effect of mistake as to solvency of estate on rights of widow who relinquished dower, see EXECUTORS AND ADMINISTRATORS.

1. Insolvency is not shown by the fact that one is under execution process in favor of one creditor and threatened with suits by others. *Burton v. Willen* (Appx.) 403.

2. A voluntary assignment to a trustee for benefit of creditors is void as against creditors not assenting thereto, in the absence of statutory provisions making it valid. *Moniell v. New Castle Iron & Steel Co.* 364.

3. The Delaware Act of March 25, 1875, does not validate assignments of creditors which are otherwise invalid, or alter the prior law upon that subject, but simply provides a course of procedure in case a valid assignment has been effected. *Ibid.*

4. An injunction allowed against collecting judgment from surety of insolvent principal on a usurious contract. *Hazel v. Sinez*, 19.

INTERPLEADER.

Rules applicable to request for specific performance, when presented by interpleader. *Diamond State Iron Co. v. Tod*, 163.

INTERROGATORIES.

In pleadings, see PLEADING.

JUDGMENT.

1. A judgment against a surety—held to be satisfied in equity, and an injunction granted against enforcing it. *Hazel v. Sinez*, 19.

2. An injunction to restrain collection of a judgment at the suit of a receiver appointed in another State,—denied. *Stockbridge v. Beckwith*, 72.

JUDICIAL SALES.

For sale of decedent's property, see **EXECUTORS AND ADMINISTRATORS.**

JURISDICTION.

Of courts, see **COURTS.**

Plea to raise question of, see **PLEADING.**

KENT COUNTY.

Resolutions of the Bar of Kent County on the death of Chancellor Saulsbury. (Appx.) 488.

LEGACY. See **WILLS.****LEVY.**

An injunction against proceeding under a levy on execution,—sustained on the ground that the judgment was satisfied. *Hazel v. Siner*, 19.

LEVY COURT. See **COURTS.**

Effect of settlement of collector's accounts in, see **ACCOUNTS.**

MARRIED WOMAN. See **HUSBAND AND WIFE.****MOROCCO FACTORY.**

1. Pollution of stream by morocco factory restrained by preliminary injunction. *Jessup & Moore Paper Co. v. Ford*, 52.

2. Injunction against pollution of stream by morocco factory made perpetual by consent. *Forman v. Ford*, 47.

MORTGAGE.

1. Where a mortgagor executes to the mortgagee a deed of the mortgaged premises, absolute on its face, the court will view with distrust and scrutinize with closeness the negotiation that led to the making of such deed, whereby it is claimed by the mortgagee that the right of redemption was extinguished and the previous mortgage converted into an absolute sale. *Walker v. Farmers' Bank of the State of Delaware*, 81.

2. In equity, a conveyance, whatever form it may assume, will be treated as a mortgage whenever it appears to have been taken as a security for an existing debt or a contemporaneous loan; and the inclination of the court is, in doubtful cases, so to treat it and allow the grantor to redeem. *Ibid.*

3. It is not essential to the validity of a purchase of the equity of redemption by the mortgagee, that he be able afterwards to show that he paid for the property all that any one would have been willing to give. *Ibid.*

4. The use of the prescribed form of legal process for enforcing a mortgage upon land is not such an exercise of power by

MORTGAGE—Continued.

the mortgagee over the mortgagor as a mortgagee in possession is forbidden to use to obtain a conveyance of the realty from the mortgagor. *Ibid.*

5. Default having occurred on a real-estate mortgage, judgment was recovered on *scire facias* upon the mortgage, and subsequently *levari facias* was issued on the judgment. Thereupon (the mortgagee not being in possession) negotiations took place between the parties, which resulted in the withdrawal of the *levari facias* by the mortgagee, and the execution of a deed of the mortgaged premises, by the mortgagor to the mortgagee, in satisfaction of the indebtedness. Thereafter the mortgagee,—grantee in said deed—sold the property for more than enough to satisfy the indebtedness, and the mortgagor thereupon filed a bill against the mortgagee, alleging that the deed was procured by deception and fraud, and that it was intended as a mortgage, and praying that the surplus of the amount received by the defendant from the sale of the premises, over the indebtedness, be paid over to complainant. *Held*, on the facts, that there was no unfairness manifest in procuring the deed; that the mortgagor was not compelled in any manner to sell to the mortgagee otherwise than from the want of a better purchaser; that he did not sell to the mortgagee for less than others would have given; that the consideration for the conveyance was not inadequate, nor was it coupled with unfairness or oppression; and, hence, that there should be a decree for defendant. *Ibid.*

MUNICIPAL CORPORATIONS.

On extending the corporate limits of a town so as to take in streets and alleys which have been dedicated, no condemnation for such streets is necessary. *Fulton v. Dover*, 1.

MUTILATION.

Of tax lists, injunction against. *Biggs v. Buckingham*, 267.

NECESSARIES.

For infants, see **INFANTS**.

NEW CASTLE COUNTY.

Resolutions of the Bar of New Castle County on the death of Chancellor Saulsbury. (Appx.) 489.

NOTICE.

Of condemnation of land for highways held to be too late. *Fulton v. Dover*, 1.

NUISANCE.

Injunction to prevent pollution of stream, see **INJUNCTION**.

OBLITERATION.

Of entries on tax lists prevented by injunction. *Mealey v. Buckingham*, 856.

ORPHANS' COURT. See **COURTS.****PARTIES.**

Plea as to, see **PLEADING.**

PARTITION.

For investment of proceeds of, see **COTENANCY.**

PAYMENT.

Defense of, sufficient to defeat injunction. *Burton v. Willen* (Appx.) 403.

PERSONAL PROPERTY.

Specific performance of contract relating to, not usually granted. *Diamond State Iron Co. v. Todd*, 163.

PETITION.

Proceeding by, to set aside widow's election. *Green v. Saulsbury* (Appx.) 871.

PLEADING.

1. A plea that complainant has no right to maintain his suit in any of the capacities in which he sues does not raise the question of jurisdiction in the court to hear and determine the matters in controversy. *Biggs v. Buckingham*, 267.

2. By force of the rules of this court, when the allegations of the bill are sustained by a single undischarged witness the complainant will be entitled to prevail as against a sworn answer, where no interrogatories were annexed to the bill and an answer under oath was not required. *Cummins v. Jerman*, 122.

3. A plea of payment held sufficient remedy at law to prevent injunction. *Burton v. Willen* (Appx.) 403.

4. What pleadings necessary in proceedings to protect rights of widow in estate. *Green v. Saulsbury* (Appx.) 871.

POLLUTION.

Of waters, see **WATERS.**

For injunction against pollution of waters, see **INJUNCTION.**

PREMATURE ACTION. See **ACTION.****PRESUMPTION.**

In favor of the correctness of an assessment against parties named thereon. *Biggs v. Buckingham*, 267.

PRINCIPAL AND SURETY.

For effect on surety's liability, of settlement of collector's account by Levy Court, see **ACCOUNT.**

For contribution between sureties, see **CONTRIBUTION.**

PRINCIPAL AND SURETY—Continued.

1. The obligation of sureties on a tax collector's bond is limited to the faithful performance of the duty of the principal. *Mealey v. Buckingham*, 856.

2. An injunction is allowed against a proceeding to enforce against a surety a judgment satisfied in equity as to him by the creditor's action in respect to a levy on goods of the principal debtor. *Hazel v. Sinez*, 19.

3. An injunction against enforcing an execution against a surety on a judgment obtained on a usurious contract, is granted without requiring the surety to tender money actually lent with interest. *Ibid.*

4. An injunction in favor of a collector's surety is allowed to prevent altering or obliterating entries on tax lists. *Mealey v. Buckingham*, 856.

RECEIVERS.

An injunction in favor of a receiver appointed in another State to restrain the collection of a judgment,—denied. *Stockbridge v. Beckwith*, 72.

RECOGNIZANCE. See BAIL AND RECOGNIZANCE.**REDEMPTION.**

From mortgage, see MORTGAGE.

RESOLUTIONS.

Of the Bar on the death of Chancellor Saulsbury (Appx.) 436, 438, 439.

RIPARIAN RIGHTS. See WATERS.**RULE.**

Of court as to effect of pleadings as evidence, see PLEADING.

Proceeding by, to set aside widow's election. *Green v. Saulsbury* (Appx.) 871.

SAULSBURY, CHANCELLOR WILLARD.

Memoir of (Appx.) 431.

Resolutions of Bar on death of (Appx.) 436, 438, 439.

SET-OFF.

1. Equity will not set off an open and unascertained account against a fixed indebtedness on a recognizance. *Burton v. Wilen* (Appx.) 403.

2. Equity will not aid a set-off of liability upon a recognizance in the hands of an assignee against advances made without authority by the obligor when in the position of a guardian. *Ibid.*

SETTLEMENT.

Of accounts, see ACCOUNT.

SPECIFIC PERFORMANCE.

1. Specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, depending upon whether the contract appears, from all circumstances, to be equitable or not. *Diamond State Iron Co. v. Todd*, 168.

2. As a general rule, equity will not enforce specific performance of contracts relating to personal property, unless it is apparent that failure to perform cannot be adequately redressed by damages. *Ibid.*

3. It seems to be the established rule in this country that equity will not enforce specific performance of contracts for the sale of corporate bonds and stock. *Ibid.*

4. To entitle a contract to be specifically enforced it must be without ambiguity and uncertainty. *Ibid.*

5. Definiteness and certainty in reference to security for deferred payments of purchase money are as requisite to entitle a contract for the sale of personal property to specific performance as they are to a contract for the sale of real estate. *Goodwin v. Collins*, 4 Houst. 28, applied. *Ibid.*

6. The same principles are applicable to a request for specific performance when presented by interpleader as when presented by original bill for specific performance. *Ibid.*

7. A decree for specific performance of a contract for the sale of stock in a private business corporation, evidenced by an offer in writing signed by the vendor and accepted in writing by the vendee, refused—the contract being uncertain in respect to security for deferred payments of the purchase money, and as to time of delivery of the stock and payment therefor, and showing want of deliberation, and it appearing from the evidence that the parties did not deal on an equality, but that the vendee being an officer of the corporation, had the advantage of the vendor in reference to knowledge of the real value of the stock (which was greater than the consideration stipulated in the contract) that no part of the purchase money had been paid at any time by the vendee, and no tender thereof made until some time after the making of the contract, and it not appearing that the vendee had suffered any damages or, if he had suffered any, that they could not be redressed at law. *Ibid.*

STATUTES.

Statutes appropriating private property to public use must be strictly pursued. *Fulton v. Dover*, 1.

STAY.

Of execution, see **EXECUTION**.

STOCK.

1. Sale of bank stock is allowed to pay debts and expenses of testator's estate. *Hoffecker v. Clark*, 125.

STOCK—Continued.

2. Specific performance of a contract for the sale of bonds and stock is not allowed. *Diamond State Iron Co. v. Todd*, 163.

STREAM.

For injunction against pollution of, see **INJUNCTION**.

For riparian rights on, see **WATERS**.

STREETS.

For dedication of land for, see **DEDICATION**.

SUIT. See ACTION.**SUSSEX COUNTY.**

Resolutions of the Bar of Sussex County on the death of Chancellor Saulsbury. (Appx.) 436.

TAXES.

For obligation on tax collector's bond, see **BONDS**.

1. An injunction is allowed against altering or obliterating entries on tax lists. *Mealey v. Buckingham*, 356.

2. An injunction to prevent striking names from a tax list at suit of a citizen and tax payer,—is denied. *Biggs v. Buckingham*, 267.

3. An injunction against striking names from a tax list is sustained at the suit of the county clerk. *Ibid.*

4. The power to strike from the assessment list names alleged to be unlawfully thereon is not given to the Levy Court by Del. Rev. Stat. chap. 8, §§ 9, 12, authorizing it to "correct and add to the assessments returned" and to make "additions to and corrections of the assessment list." *Ibid.*

5. No discretion is given by implication to the Levy Court to drop from the tax list names which it may judge to be illegally thereon, by a statute prohibiting the dropping of names "legally" thereon, if the law itself designates certain classes of persons whose names shall not appear on the list; but the duty of the court is ministerial to drop all names belonging to the designated class, and no others. *Ibid.*

6. The law presumes that when an assessor returns his assessment at the time and in the manner provided by law, the names thereon legally appear, unless the law itself shows the contrary by pointing out ascertained names that are forbidden to appear thereon. *Ibid.*

7. Express authority of the legislature is required to enable a Levy Court to judicially determine that names on a tax list are illegally there, and to strike them off, if they are not within any of the classes which the law itself provides shall not be on the list. *Ibid.*

TAXPAYER.

The right of a taxpayer to maintain a suit to enjoin striking names from a tax list,—is denied. *Ibid.*

TENANT IN COMMON. See **COTENANCY.****TENDER.**

Tender by surety is not required in order to obtain injunction against the collection of a usurious debt. *Hazel v. Sinez*, 19.

TRUSTS.

By assignments for creditors, see **INSOLVENCY.**

In wills, see **WILLS.**

A sale of bank stock devised in trust is ordered to pay debts and expenses. *Hoffecker v. Clark*, 125.

USURY.

B borrowed money from S on a usurious contract, giving his judgment bond therefor with H as surety therein. B, the principal, becoming insolvent, S issued an execution against H, the surety, to enforce payment. *Held*, that S should be forever restrained from collecting the amount of the judgment out of the surety. *Held*, further, that it was not necessary for H, the surety, either before bringing his bill or at the trial, to tender himself ready to pay the sum actually lent, with interest, and that the principal and surety stood upon a different footing in this respect. *Hazel v. Sinez*, 19.

VENDOR AND PURCHASER.

A contract for the sale of real estate must be definite and certain, to sustain specific performance. *Diamond State Iron Co. v. Todd*, 163.

WATERS.

For injunction against pollution of, see **INJUNCTION.**

A riparian owner on a natural stream has a legal right to the flow of the stream, in its accustomed channel and usual volume, and in its accustomed purity, unpolluted by riparian owners above. *Jessup & Moore Paper Co. v. Ford*, 52.

WILLS.

1. If a devise be made to the "heir," "right heir," or "heir at law," of a testator, and there be a person when the disposition of the will takes effect who answers that description, no other person can take, unless by plain declaration in other parts of the will the testator intends that some other person shall take, and sufficiently identifies him. *Mason v. Baily*, 129.

2. This is the rule also where devise is made to the "heir," "right heir," or "heir at law" of another person by a testator. *Ibid.*

WILLS—Continued.

3. A bequest of personalty to the right heirs or to the heirs at law of an individual *prima facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger. *Ibid.*

4. If a gift be made to one for life, with remainder to his right heirs, the heir in the strict sense is entitled. *Ibid.*

5. If a bequest of personal property is made to A, to receive the income, dividends, and profits, and to pay over the same to B for her life, and immediately after the death of B to assign and pay over the principal sum to the right heirs of B,—the right heirs of B alone can take, to the exclusion of the husband of B and to the exclusion of the administrator of B. *Ibid.*

6. The right heir of a person deceased is he of the blood of such deceased upon whom the law casts the inheritance. *Ibid.*

7. A husband is not the right heir of his deceased wife, in the strict and primary sense of that term. *Ibid.*

8. An administrator is not a right heir, in the strict and primary meaning of that term, of a person dying intestate. *Ibid.*

9. No obligatory trust is created by a will giving all of testator's estate to his wife with a request that if she does not require the whole of it as a support, she will, at her death, will the remainder to certain other persons named. *Bryan v. Milby*, 208.

10. The general rule is that a legacy in the form of direction to pay, or to pay and divide at a future period, vests immediately, if the payment be postponed for the convenience of the estate or to let in some other interest. *Rubencane v. McKee*, 40.

11. A will construed and held to create a trust as to certain bank and municipal stocks, and the administrator *cum testamento annexo* instructed to assign such stocks to the persons who may be appointed trustees in the place of those named in the will, who had declined to serve. *Hoffecker v. Clark*, 125.

12. A testator bequeathed as follows: "I give and bequeath unto my friend Jacob Rubencane the sum of \$1,200; in trust; nevertheless, to pay the interest thereof unto my niece, Annabella Town, half-yearly for and during her natural life, . . . and from and immediately after the decease of the said Annabella Town, to pay the said principal sum of \$1,200 to the child or children of the said Annabella Town, free and discharged from this trust." The remainder of his estate was devised to his nephew, James W. Ball, who was appointed executor. The testator died in 1851. Annabella Town died in October, 1885. She had two children, Anna T., born in 1844, and James, born in 1852. Anna T. married in 1869 and died in April, 1885, leaving a husband and one child. James died in 1855, when about three

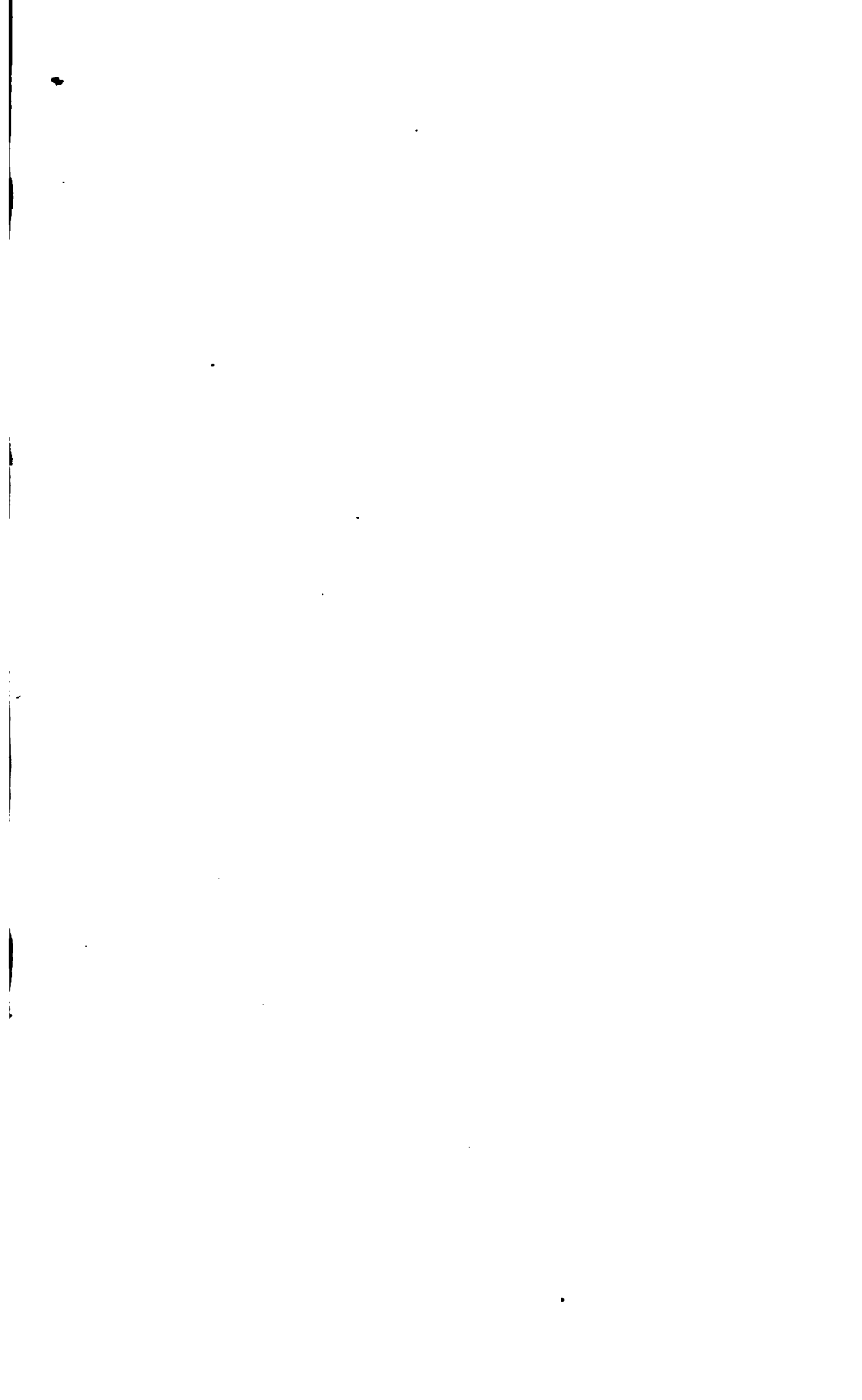
WILLS—*Continued.*

years of age. *Held*: (a) That the legacy vested at the death of the testator in the children of Annabella Town, whether they survive their mother or not. (b) That on the death of Annabella Town, the administrator of the children took their respective shares by right of representation, and the trustee must pay them the trust fund accordingly. *Rubencane v. McKee*, 40.

18. The election of a widow to take under a will as against her dower, in the mistaken belief that the estate is solvent, is held ground for ordering an investment to raise an annuity. *Green v. Saulsbury* (Appx.) 871.

14. The right of a widow who has relinquished her dower rights in order to permit a sale of the real estate to pay debts, to have the provisions of the will in her favor in lieu of dower secured to her or to have her election set aside, may be secured as well by petition and rule as by bill and answer. *Ibid.*

Ex. 13.



HARVARD [REDACTED]RY

